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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 416

RAYMOND GONZALES, JR., PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 21, 1959
CERTIORARI GRANTED NOVEMBER 23, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 416

RAYMOND GONZALES, JR., PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 6045

RAYMOND GONZALES, JR., Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS—Filed December 18, ~~1956~~ 1958

The points upon which the Appellant will rely on appeal are:

1. The denial of the conscientious objector's status was without basis in fact, thus making the final 1-A Classification by the Appeal Board arbitrary and capricious.

2. The recommendation of the Department of Justice upon the first appeal that the conscientious objector's status be denied because of Appellant's belief in self-defense and theocratic war was a denial of procedural due process of law before the Appeal Board because it was not retracted by the Department of Justice and relied upon illegal and false standards.

3. The recommendation of the Department of Justice upon the second appeal that the conscientious objector's status should be denied because the Appellant's claim as to his religious activity was so exaggerated as to cast doubt on his sincerity and good faith was a denial of procedural due process and was arbitrary and capricious because it contained fictitious and misleading information and adverse evidence that was not made known to the Appellant at the time of his hearing.

4. There was a denial of procedural due process of law before the Appeal Board by the Department of Justice in failing to supply Appellant with the full FBI report so that he could make use of all the favorable evidence in said report in presenting his claim for classification as a con-

scientious objector to the Appeal Board and also in failing to supply the Appeal Board the full FBI report so that it could make use of all the favorable evidence in said report [fol. 2] in considering Appellant's claim and in classifying him.

5. Appellant was denied procedural due process of law by the Department of Justice before the Appeal Board because the recommendation by it to the Appeal Board contained unfair representations and illegal grounds for the denial of the conscientious objector claim and made serious omissions of facts favorable to the Appellant.

6. Reversible error was committed by the Trial Court in quashing the Appellant's Subpoena Duces Tecum and in excluding from the evidence the longhand notes of the Hearing Officer, Maurice E. Evensen, and the report of the Hearing Officer to the Department of Justice upon the hearing conducted by him, which were material and relevant.

7. Reversible error was committed by the Trial Court in quashing the Subpoena Duces Tecum served on Fred M. Mazzulla, Hearing Officer, compelling the production of both the original FBI report and his report to the Department of Justice and his longhand notes.

8. The Trial Court committed reversible error in excluding from the evidence the original full FBI investigative report of the inquiries when they were offered for the material and relevant purpose of showing that the Appellant was denied procedural due process of law before the Appeal Board when favorable evidence supporting his conscientious objector claim was not fully and adequately summarized and presented to the Appeal Board.

9. The Trial Court erred in quashing the Appellant's Subpoena Duces Tecum served upon Scott J. Werner, Special Agent in Charge of the Federal Bureau of Investigation, compelling the production of the FBI records relating to the Appellant that were material and relevant.

10. The Local Board denied the Appellant procedural due process of law upon his personal appearance held on

August 17, 1956, by refusing him the right to present all the evidence he wanted to present and by denying him a full and fair hearing and the right to discuss his case and the right to read from the Bible proof of his ordination which was an issue as to his ministerial claims, contrary to Section 1624 of the Selective Service Regulations and the fair and just provisions of the Act.

[fol. 3] 11. The Appellant was denied a full and fair hearing and procedural due process of law by the Hearing Officer of the Department of Justice upon the hearing conducted on January 7, 1957, because the Hearing Officer failed to give the Appellant an opportunity to explain the adverse evidence relating to the charge that the Appellant exaggerated the number of hours devoted to the field of the ministry, and upon which the Department of Justice based its recommendation to the Appeal Board, without allowing the Appellant to explain or be confronted with the evidence that it relied upon in the recommendation, was a denial of procedural due process in validating the final order.

12. The Appellant was denied procedural due process of law and a full and fair hearing before the Appeal Board by the Department of Justice, through its recommendation dated March 21, 1957, which contained a false and misleading representation to the Appeal Board that the Appellant exaggerated his statements about the time he devoted to his ministry by sending to the Appeal Board the resume of the FBI report containing a false statement and also by withholding favorable elements and by not forwarding the printed documents containing the religious view of Jehovah Witnesses on conscientious objection relied upon by the Appellant and filed with the Hearing Officer.

13. Section 1626.25 of the Selective Service Regulations, 32 C.F.R. 1626.25, as amended on June 17, 1952, insofar as it provides for the omission of the report of the Hearing Officer made to the Department of Justice from the Draft Board File and upon which the final recommendation of the Department of Justice is based, is void and is in itself a denial of a full and fair hearing and a denial of due process under the Fifth Amendment of the Constitution.

14. The Appellant was denied procedural due process of law by the Department of Justice and a full and fair hearing before the Appeal Board through the Department of Justice by their not sending to the Appeal Board and including in the Draft Board File the report of the Hearing Officer of the hearing conducted on January 7, 1957, in violation of the Fifth Amendment of the Constitution.

15. The Court erred in not granting the Appellant's motion for a judgment of acquittal on the grounds specified therein.

Hayden C. Covington, W. H. Erickson, Attorneys for Appellant.

Filed December 18, 1958.

[fol. 4]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff,
vs.
RAYMOND GONZALES, JR., Defendant.
No. 15,373, Criminal

INDICTMENT—Filed August 16, 1957

The Grand Jury charges:

That Raymond Gonzales, Jr., on the 17th day of March, 1952, was a male citizen of the United States, and residing therein, between the ages of 18 and 26, who, pursuant to the rules and regulations prescribed under the Universal Military Training and Service Act, as amended, duly registered before Local Board No. 9, Boulder, Colorado, a duly created Selective Service Board.

That thereafter, through due processes of classification, said Raymond Gonzales, Jr., was classified in Class I-A on May 2, 1957, by the Colorado State Appeal Board, in the

City and County of Denver, in the State and District of Colorado, having previously been examined and found acceptable for service in the Armed Forces.

That thereafter on June 3, 1957, said Raymond Gonzales, Jr. was mailed an Order to Report for Induction on June 24, 1957, said Order directing him to report to the Bus Depot, 1765 14th Street, Boulder, Colorado, for forwarding to an induction station.

That thereafter on June 24, 1957 at the Headquarters, U.S. Army Recruiting Main Station, 101 Old Custom [fol. 5] House, 16th & Arapahoe Streets, Denver 2, Colorado, in the City and County of Denver, in the State and District of Colorado, to which installation said Raymond Gonzales, Jr. reported at the direction of Local Board No. 9, Boulder, Colorado, the said Raymond Gonzales, Jr. did knowingly fail, refuse and neglect to perform the duty required of him under the provisions of the Universal Military Training and Service Act of 1951, as amended, to-wit, to submit himself to induction into the Armed Forces of the United States, in accordance with the provisions of the Universal Military Training and Service Act of 1951, as amended, and the rules and regulations made in *pursuant* thereof.

A True Bill.

Rita F. Redak, Deputy Foreman.

Donald E. Kelley, United States Attorney.

Filed August 16, 1957.

In United States District Court

Courtroom Minute Sheets

Judge presiding William Lee Knous   Date Nov 8 1957
Deputy Clerk Clarence J. Eich   Reporter Marson
Case No. 15373   United States vs. Raymond Gonzales Jr.
Counsel for Government: Pfeiffer

Proceedings And Plea:

(X) Defendant's constitutional rights of counsel ex-plained (X)

Age 23
Number of Counts 1

(X) Ordered that the arraignment be continued to *Nex Wek* 11-15-57.

Filed November 8, 1957.

[fol. 6]   Courtroom Minute Sheet

Judge presiding William Lee Knous   Date Nov 15 1957
Deputy Clerk Clarence J. Eich   Reporter Marson
Case No. 15373   United States vs. Raymond Gonzales Jr.

(Government: Pfeiffer
Counsel for (
(Defendant: William Erickson   Retained

Age 23

(X) Waived reading (X) Indictment ( ) Information ( ) Read to Defendant

(X) Plea of Not Guilty to Counts: 1-2-3-4-5-6-7-8-9-10

(X) (Signed) Waiver of Trial To Jury.

(X) Ordered to be set (C) For Trial. ( ) Before the Grand Jury.

(X) Ordered that the Bond Be Continued.

Filed November 15, 1957.

IN UNITED STATES DISTRICT COURT

ARRAIGNMENT AND PLEA—Entered November 15, 1957

On the 15th day of November, 1957, The United States of America appeared by John S. Pfeiffer, Assistant United States Attorney and the defendant Raymond Gonzales, Jr. appeared in person and by his counsel William H. Erickson, Esq., before the Honorable William Lee Knous, Chief Judge of the United States District Court for the District of Colorado, and the defendant waived the reading of the indictment and entered his plea of not guilty to the one count and signed a waiver of trial by the jury.

Entered November 15, 1957.

IN UNITED STATES DISTRICT COURT

WAIVER OF JURY TRIAL—Filed November 15, 1957

I, the undersigned defendant in the above-entitled action, accused of refusal to submit to induction into Armed Forces, in violation of 50 U.S.C. App. 462(a) pursuant to the Provisions of Rule 23a of the Rules of Criminal Procedure for the District Courts of the United States, do hereby waive, in writing, my right to a jury trial, and consent that I be tried to the Court without a jury.

[fol. 7] Raymond Gonzales Jr., Defendant.

W. H. Erickson, Attorney for Defendant.

Approved:
William Lee Knous
11/15/57

Consent is hereby given to the trial of the above-named defendant to the Court, without a jury.

John S. Pfeiffer, Asst. United States Attorney for the District of Colorado.

Filed November 15, 1957.

IN UNITED STATES DISTRICT COURT

SUBPOENA DUCES TECUM AND RETURN—Filed August 28, 1958

To: Fred M. Mazzulla, Symes Building, Denver, Colorado, Hearing Officer, Department of Justice.

You are hereby commanded to appear in the United States District Court for the District of Colorado at the Courtroom of Judge A. A. Arraj, Postoffice Building, in the City and County of Denver, on Wednesday, the 3rd day of September, 1958, at 9:30 o'clock A.M. to testify in the case of United States v. Raymond Gonzales, Jr., and bring with you the following:

(1) Your notes on the hearing conducted by you on the 4th day of November, 1953.

(2) Stenographer's transcript of the questions and answers of the registrant, Raymond Gonzales.

(3) Copy of the resume or summary of the Federal Bureau of Investigation report mailed to the Defendant, Raymond Gonzales.

(4) Copy of the report of the hearing conducted by you and mailed to the Attorney General in Washington, D.C. [fol. 8] on the conscientious objections of Raymond Gonzales, the Defendant, whose Selective Service number is 593458, and which hearing officer's report was used by the Department of Justice in making recommendation to the appeal board against the conscientious objection claim of the Defendant.

(5) All correspondence relating to the Defendant Raymond Gonzales, all reports made by you on or concerning the Defendant Raymond Gonzales regarding his classification for military service.

(6) All documents, instruments, opinions and information related to, concerning, or in anywise involving the Defendant, Raymond Gonzales, regarding his classification for military service.

This Subpoena is issued upon application of the Defendant.

(Seal)

G. Walter Bowman, Clerk, By Dorothy R. Tuomi, Deputy Clerk.

Dated: August 26, 1958

Return

Received this Subpoena at Denver, Colorado, on the 26th day of August, 1958, and on the 27th day of August, 1958, at Denver, Colorado served it on the within named Fred M. Mazzulla, by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law. ($4.00)

Tom O. Kimball, US Marshal, By Ray Keech.

Dated: August 27th, 1958

Filed August 28, 1958.

IN UNITED STATES DISTRICT COURT

SUBPOENA DUCES TECUM AND RETURN—Filed September 4, 1958

To: Maurice A. Evensen, Hearing Officer, Department of Justice, 414 Thatcher Building, Pueblo, Colorado.

You are hereby commanded to appear in the United States District Court for the District of Colorado at the [fol. 9] Courtroom of Judge A. A. Arraj, Postoffice Building, in the City and County of Denver, on Wednesday, the 3rd day of September, 1958, at 9:30 o'clock A.M. to testify in the case of United States v. Raymond Gonzales, Jr., and bring with you the following:

(1) Your notes on the hearing conducted by you on the 20th day of October, 1953.

(2) Stenographer's transcript of the questions and answers of the registrant, Raymond Gonzales.

(3) Copy of the resume or summary of the Federal Bureau of Investigation report mailed to the Defendant, Raymond Gonzales.

(4) Copy of the report of the hearing conducted by you and mailed to the Attorney General in Washington, D.C. on the conscientious objections of Raymond Gonzales, the Defendant, whose Selective Service number is 593458, and which hearing officer's report was used by the Department of Justice in making recommendation to the appeal board against the conscientious objection claim of the Defendant.

(5) All correspondence relating to the Defendant, Raymond Gonzales, all reports made by you on or concerning the Defendant, Raymond Gonzales, regarding his classification for military service.

(6) All documents, instruments, opinions and information related to, concerning, or in anywise involving the Defendant, Raymond Gonzales, regarding his classification for military service.

This Subpoena is issued upon application of the Defendant.

(Seal)

G. Walter Bowman, Clerk, By Dorothy R. Tuomi,
Deputy Clerk.

Dated: August 26, 1958

Return

Received this Subpoena at Pueblo, Colorado, on the 27th day of August, 1958, and on the 29th day of August, 1958, at Grand Junction, Colorado served it on the within named Maurice A. Evensen, by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law. Two checks: U.S. Marshal's check [fol. 10] in the amount of $22.40 and Hendry Erickson and Myer's check in the amount of $25.00.

Tom O. Kimball, U.S. Marshal, By N. C. Domeron, Deputy.

Dated: September 2, 1958

Service Fees

566 Miles	Travel	$56.60
1	Services	.50
	Total	$57.10

Filed September 4, 1958.

In United States District Court

Subpoena Duces Tecum And Return—Filed September 2, 1958

To: Scott J. Werner, Special Agent In Charge, Federal Bureau Of Investigation, Room 254 New Customs House Building, Denver, Colorado.

You are hereby commanded to appear in the United States District Court for the District of Colorado at the Courtroom of Judge A. A. Arraj, Postoffice Building, in the City and County of Denver, on Wednesday, the 3rd day of September, 1958, at 9:30 o'clock A.M. to testify in the case of United States vs. Raymond Gonzales, Jr., and bring with you all reports of the Federal Bureau of Investigation in connection with the classification of Raymond Gonzales for military service and the complete secret investigative report made by the agent or agents of the Federal Bureau of Investigation, including all written statements taken from witnesses in connection with the investigation, and used by Fred M. Mazzulla and Maurice A. Evensen, Hearing Officers of the Department of Justice in conducting the hearings and making their report on the conscientious objections of Raymond Gonzales, the defendant, whose Selective Service number is 593458, which was also used by the Department of Justice in making the recommendation to the appeal board.

This Subpoena is issued upon application of the defendant.

(Seal)

G. Walter Bowman, Clerk, By C. T. Magnuson, Deputy Clerk.

Dated: ...., 1958.

[fol. 11] **Return**

Received this Subpoena at Denver, Colorado, on the 27th day of August, 1958, and on the 27 day of August, 1958, at Denver, Colorado served it on the within named Scott J. Werner, Special Agent In Charge, Federal Bureau Of Investigation, by delivering a copy to him and tendering to him the fee for one day's attendance and the mileage allowed by law.

Tom O. Kimball, US Marshal, By Ray Keech, Deputy.

Dated: August 27th, 1958

Filed September 2, 1958.

IN UNITED STATES DISTRICT COURT

MOTION TO QUASH SUBPOENAS DUCES TECUM—Filed August 28, 1958

Comes now Donald E. Kelley, United States Attorney for the District of Colorado, and moves that the Court quash the *subpoenaes* duces tecum in the above entitled case issued by the United States District Court Clerk on August 27, 1958, commanding that Herbert M. Boyle, Assistant United States Attorney for the District of Colorado and Scott J. Werner, Special Agent in Charge of the Federal Bureau of Investigation, Denver, Colorado, appear on

September 3, 1958 at 9:30 a.m. and produce in open court all reports of the Federal Bureau of Investigation in connection with the classification of Raymond Gonzales, Jr. for military service and the complete secret investigative report made by the agent or agents of the Federal Bureau of Investigation, including all written statements taken from witnesses in connection with the investigation, and used by Fred M. Mazzulla and Maurice A. Evensen, Hearing Officers of the Department of Justice in conducting the hearings and making their report on the conscientious objections of Raymond Gonzales, whose Selective Service number is 593458, which was also used by the Department of Justice in making the recommendation to the appeal board, and as grounds for this motion states:

That the foregoing papers are confidential papers of the United States Government and are not subject to production. Bouziden v. United States, 251 F. 2d 728, 1958 10 Cir.

Donald E. Kelley, United States Attorney for the District of Colorado.

Filed August 28, 1958.

[fol. 12]

In United States District Court

Orders Made During Trial—September 3, 1958

This cause having come on before the Honorable Alfred A. Arraj, Judge, for trial to the court on September 3, 1958, a jury having been waived, in writing, and the United States of America being represented by John S. Pfeiffer, Assistant United States Attorney, and the defendant Raymond Gonzales, Jr., being represented by William H. Erickson, Esq., and Hayden C. Covington, Esq., Attorneys at Law, and the trial having proceeded, at which testimony and exhibits were offered, and during the course of said trial, the following rulings were made, and it was

Ordered as follows:

1. That the plaintiff's motion to quash Subpoena Duces Tecum be taken under advisement; to be ruled on during the trial.

2. That the defendant be granted permission to withdraw his oral motion to dismiss the indictment.

3. That the plaintiff's motion to quash the Subpoena Duces Tecum as to Maurice A. Evensen be granted.

4. That the defendant's oral motion to set aside the ruling on the plaintiff's motion to quash Subpoena Duces Tecum be denied.

5. That the plaintiff's motion to quash the Subpoena Duces Tecum as to Fred M. Mazzulla be granted as to his notes and the report to the Department of Justice.

6. That the plaintiff's motion to quash the Subpoena Duces Tecum as to Scott J. Werner and as to Herbert M. Boyle be granted.

7. That the defendant's oral motion for judgment of acquittal be denied.

Entered September 3, 1958.

IN UNITED STATES DISTRICT COURT

FINDINGS OF GUILTY—September 4, 1958

This cause having come on regularly for trial to the Court on September 3, 1958, a jury having been waived in writing, and the trial having proceeded to conclusion;

[fol. 13] The Court finds from the evidence that the defendant is guilty as charged in the indictment; it is therefore

Ordered that the judgment be deferred pending a presentence investigation and the bail bond of the defendant shall be continued.

Dated at Denver, Colorado, this 4th day of September, A.D., 1958.

By the Court: Alfred A. Arraj, United States District Judge.

Entered September 5, 1958.

IN UNITED STATES DISTRICT COURT

COURTROOM MINUTE SHEET

Judge presiding Alfred A. Arraj Date Sep 19 1958

Deputy Clerk T. Magnuson Reporter Watson

Commissioner No. .... Age 23 Temporary Reporter ....

Case No. 15373

UNITED STATES v. RAYMOND GONZALES, JR.

(Gov't: Perrill
Counsel For (
(Deft: W. H. Erickson—Retained

Judgment Of The Court: Total 15 months

15 Mo.

(X) Ordered Appeal Bond set at $2,000.00

Filed September 19, 1958.

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT—September 19, 1958

On this 19th day of September, 1958 came the attorney for the government and the defendant appeared in person and by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the [fol. 14] offense of not guilty and a finding of guilty of the offense of refusal to submit to induction into Armed Forces, in violation of 50 USC App. 462(a) as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen (15) months upon the Indictment herein, from and after this 19th day of September, 1958.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Alfred A. Arraj, United States District Judge.

Entered September 19, 1958.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed September 20, 1958

Name and address of appellant: Raymond Gonzales, Jr., 901 South Conejos Street, Colorado Springs, Colorado.

Name and address of appellant's attorney: W. H. Erickson, 1611 First National Bank Building, Denver 2, Colorado; Hayden C. Covington, 124 Columbia Heights, Brooklyn 1, New York.

Offense: Refusal to submit to induction into the Armed Forces of the United States, in violation of 50 USC, App. 462(a).

Concise statement of judgment or order, giving date, and any sentence: Verdict of guilty returned by the Honorable Alfred A. Arraj on September 4, 1958. Sentence of the Court imposed on September 19, 1958: Fifteen (15) months in the custody of the Attorney General of the United States. [fol. 15] Name of institution where now confined, if not on bail: Appellant is now in custody of the United States Marshal, Denver, Colorado.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the above-stated judgment.

I further elect not to commence service of the sentence imposed and ask to be admitted to bail.

Dated this 19th day of September, 1958.

Raymond Gonzales, Jr., Appellant.

Filed September 20, 1958.

[By order of October 29, 1958, the time for docketing the cause in the Court of Appeals was extended to November 28, 1958.]

[An appearance bond was filed September 19, 1958.]

IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

Date	*Proceedings*
1957	
8/16	Order: Grand Jury returns Indictment W/A to issue Bail
	Indictment
	Praecipe: Certified copy of Indictment to U S Atty
11/8	Ordered (WLK) that arraignment be continued to 11/15/57
	Court appearance bond for $2,000—5 sureties thereon.
	W/A returned executed.
11/15	Deft. Arraigned: (WLK) Plea of Not Guilty.
	Sgd. Waiver of Trial to Jury. Ordered to be set for Trial to Court. Bond continued.
1958	
7/9	Ordered (AAA) that the Trial to Court heretofore set to be heard at 9:30 A.M. on Aug. 13, 1958 be vacated.
8/28	Marshal's Return (Subpoena Duces Tecum not served Donald E. Kelley, as he is in Calif & will not

Date	*Proceedings*
	[fol. 16] return for returnable date; served Fre[illegible]. Mazzulla at Denver, Colorado on August 27, 1958; served James E. Bing at Denver, Colo. on August 26, 1958; served Herbert M. Boyle at Denver, Colo. on August 27, 1958.
	Motion to quash *Subpoenaes* Duces Tecum.
9/2	Marshal's Return—Subpoena Duces Tecum served Scott J. Werner 8/27/1958.
9/3	(AAA) Trial To Court: 1st day, Motion of Deft for admission of Atty Hayden C. Covington for this trial only—ordered granted; Motion to quash subpoenaes D/T—ordered taken under advisement; Deft permitted leave to withdraw his motion to dismiss, evidence, Pltf rests. Pltfs motion to quash subpoena D/T renewed as to Mr. Evenson—ordered granted. Exhibits, evidence; deft takes stand in own behalf. Defense rests. Deft's Motion for Jm't of acquittal—ordered denied;
	Court finds the defendant guilty as charged in the Indictment.—Clerk to prepare the order—ordered bond continued—Jm't deferred.
9/4	Marshal's Return Subpoena Duces Tecum served Maurice A. Evensen at Grand Junction, Colo. on August 29, 1958.
9/5	Sgd. (AAA) Findings of Guilty—judgment deferred—bond to be continued.
9/19	Judgment (AAA)—Deft. sentenced to imprisonment for 15 months.
	Ordered that appeal bond set at $2,000.00
	Sgd. (AAA) Judgment, two copies to the marshal.
	Sgd. (AAA) Appearance Bond on Appeal, for $2,000.00.
	Jess W. Sutton and Wm. Tymkovich, Denver, Sureties.
9/20	Notice of Appeal.

IN UNITED STATES DISTRICT COURT

Reporter's Transcript of Proceedings

Proceedings had before the Honorable Alfred A. Arraj, Judge of the United States District Court for the District of Colorado, on September 3, 1958, Courtroom C, Post Office Building, Denver, Colorado.

APPEARANCES: John S. Pfeiffer, Esq., Assistant United States Attorney, appearing on behalf of the Government. Messrs. W. H. Erickson and Hayden C. Covington, Attorneys at Law, appearing on behalf of the Defendant.

[fol. 17]

COLLOQUY BETWEEN COURT AND COUNSEL RE MOTIONS TO QUASH SUBPOENAS AND OPENING STATEMENT FOR UNITED STATES

The Court: Case No. 15373, United States of America vs. Raymond Gonzales, Jr. Mr. Pfeiffer for the Government; are you ready, Mr. Pfeiffer?

Mr. Pfeiffer: Yes, sir.

The Court: Mr. Erickson?

Mr. Erickson: Ready for the Defendant, Your Honor. At this time I would like to move the admission of Hayden C. Covington for the purposes of this case. He is a member of the New York bar and has distinguished himself in our Tenth Circuit Court of Appeals.

The Court: All right, sir, your motion will be granted.

Mr. Pfeiffer: If it please the Court, there is a matter which we should take up first, a motion to quash the subpoena duces tecum which has been filed on behalf of Mr. Herbert M. Boyle and Scott J. Werner, special agent in charge of the Federal Bureau of Investigation, if that is agreeable with counsel.

Mr. Erickson: We are ready on that, Your Honor.

Mr. Covington: No objection.

The Court: All right, we may proceed then on the motion to quash the subpoena duces tecum.

Mr. Pfeiffer: It is my understanding that a subpoena duces tecum has been served upon Herbert M. Boyle, chief assistant United States Attorney for the District of Colorado, and Scott J. Werner, special agent in charge of the Federal Bureau of Investigation for the District of Colorado and Wyoming, commanding that they appear at this time and bring with them all reports of the Federal Bureau of Investigation in connection with the classification of Raymond Gonzales for military service, and the complete Selective Service reports made by the agent or agents of the Federal Bureau of Investigation, including all written statements taken from witnesses in connection with the investigation, and used by Fred M. Mazzulla and Maurice A. Evensen, hearing officers of the Department of Justice, in conducting the hearings and making their report on the conscientious objections of Raymond Gonzales, the Defendant, whose Selective Service Number is 593458.

[fol. 18] The Court: Before we proceed, is the Defendant in court?

Mr. Covington: Yes, Your Honor, he is, and has been all the time.

The Court: All right; ordinarily he sits at counsel table.

Mr. Covington: You can sit here at the table, Mr. Gonzales.

Mr. Pfeiffer: —which was also used by the Department of Justice in making the recommendation to the appeal board. It is also my understanding that a similar subpoena duces tecum has been served upon a Mr. Maurice A. Evensen commanding that he bring forth the various papers that he has, and I am unapprised as to whether or not Mr. Mazzulla has been served also.

Mr. Erickson: Mr. Mazzulla has been served.

The Court: Mr. Mazzulla has been served, but we don't have one in here for Mr. Evensen in the file.

Mr. Pfeiffer: I am apprised that he has been served and he is present in court. We would like in view of the fact that they have been served, we would also like to amend our motion at this time to include certain matters that the Defendant wishes the hearing officers to produce, namely the report that they make to the Attorney General of the United States, which we feel is in the same category as the investigative reports themselves. We have filed a motion to quash the subpoena duces tecum as to Herbert Boyle and Scott J. Werner in regard to the FBI reports and the various matters, stating as grounds therefor that they are confidential papers of the United States Government and are not subject to production.

Mr. Covington: Pardon me, are you going to make a motion on the hearing officer Evensen?

Mr. Pfeiffer: Yes.

Mr. Covington: A motion to quash?

Mr. Pfeiffer: Yes, Evensen and Mazzulla. What I think we should move to quash is the report, and what they received in official channels, and also what they reported to the Attorney General of the United States pursuant to their duties.

[fol. 19] Mr. Covington: And his minutes, too?

Mr. Pfeiffer: And his minutes of the hearing.

Mr. Covington: Notes?

Mr. Pfeiffer: Personal notes.

The Court: So that I may be clear will you go to the subpoena and tell by number which items?

Mr. Pfeiffer: I will get a copy here, Your Honor. I am unapprised as to whether the Maurice A. Evensen subpoena is the same as the one to Fred Mazzulla, but I imagine that they are. The first one is "Your notes on hearing conducted by you on the 28th day of October, 1953."

The Court: You ask that that portion of it be quashed?

Mr. Pfeiffer: That portion of it be quashed, yes. "Stenographer's transcript of the questions and answers of the registrant, Raymond Gonzales." I will state for the Court that no stenographic transcript was taken at that time, and the witness is here to state that to the Court, so I don't think there is any question about that. It says a "copy of the resume or summary of the Federal Bureau of Investigation report mailed to the Defendant, Raymond Gonzales." It is also my understanding that the hearing officer does not have a copy of that resume, and then also No. 4 is a "copy of the report of the hearing conducted by you and mailed to the Attorney General in Washington, D.C. on the conscientious objections of Raymond Gonzales, the Defendant, whose Selective Service Number is 593458, and which hearing officer's report was used by the Department of Justice in making recommendation to the appeal board against the conscientious objection claim of the Defendant."

We will move to quash the subpoena in regard to that report on the grounds that they are confidential papers of the United States Government and are not subject to production.

No. 5, "All correspondence relating to the Defendant, Raymond Gonzales, all reports made by you on or concerning the Defendant Raymond Gonzales, regarding his classification for military service." I think that there is very [fol. 20] little correspondence, but No. 5 would include a number of items that have been referred to in 1, 2, 3 and 4, and we will move to quash that portion of it in regard to the confidential reports.

No. 6, "All documents, instruments, opinions, and information relating to, concerning, or in anywise involving the Defendant, Raymond Gonzales, regarding his classification for military service," and we have the same objection. We will move to quash that on the same grounds as stated before, Your Honor.

I am unapprised if there is any additional information in regard to Fred Mazzulla.

The Court: No, I followed it and I have his before me, and it follows the same order as that one that you read from.

Mr. Pfeiffer: It might be best, Your Honor, before I embark into the motion to quash here to briefly state to the Court what we believe actually transpired here, and what will come out in the evidence of the trial so that the Court will be apprised of the situation. The Defendant when he was eighteen years of age registered with Local Draft Board No. 9 in Boulder, Colorado. Shortly after his registration he was mailed a classification questionnaire. In the questionnaire I believe he asserted that he was a conscientious objector to war in any form and asked for a ministerial classification as a minister of the Jehovah Witness Sect. He was mailed a SSS Form No. 150 for conscientious objectors which he completed, and he mailed to the Local Board.

That statement was filled out. Then on December 4, 1952 the Local Board classified the registrant as 1-0, that is, conscientiously opposed to both combatant and non-combatant warfare, denoting that they recognized him as a conscientious objector. That was on December 4, 1952.

On July 1, 1953 the registrant was examined and found to be acceptable for service in the armed forces, and he was so notified. Then after reviewing the file the Local Board reclassified the registrant on July 30th 1953 and placed him in a 1-A classification, that is, denying him his claim for conscientious objections to war in any form, and also denying his ministerial claim.

The Defendant requested a personal appearance before the Local Board, and he was given a personal appearance. [fol. 21] He remained in Class 1-A, and he was granted an appeal to the state appeal board on August 13th 1952.

Mr. Erickson: Your Honor, we don't like to object, but we do believe this is out of order. Mr. Lail, I believe, is going to produce the entire Select.ve Service file which will bring to the Court's mind a complete chronology of the events that transpired, and we can't see the relevancy of this as far as their motion to quash is concerned.

Mr. Pfeiffer: The only reason I was doing it, Your Honor, was to show you factually how the FBI gets involved in this and how the reports are made. I may be able to summarize it a little better than I have been.

Mr. Erickson: I am sure the Court already knows that.

The Court: Would it be more practical in connection with your motion to quash to consider it as a continuing motion and as the matters come up have the Court rule on them, because the Court will have to have the background before he can determine whether or not the items are relevant or may be or should be produced. Is it your desire to endeavor to get these persons released so that they will not have to be in attendance?

Mr. Pfeiffer: Yes, sir, I would like that. As far as Mr. Scott Werner and Herbert Boyle are concerned, I don't think they have any personal knowledge as to what has transpired here. As to all the information that they have, I have it in my files myself and I could produce that; but, as far as the hearing officers are concerned, counsel may want to call them to question them. I do not know.

Mr. Erickson: I was going to suggest this, Your Honor: We don't want to inconvenience Mr. Boyle or Mr. Werner, and we would be willing to release them to be recalled on fifteen minutes notice. I believe they are both readily accessible to this court. We have no design to inconvenience them. Mr. Evensen we will want to call as a witness, I am sure of that.

The Court: I don't see how I can rule on these matters without having the full background, unless you gentlemen can stipulate concerning the matters.

[fol. 22] Mr. Pfeiffer: It would be a matter of law, Your Honor. There were two investigations on this and two investigations by the Federal Bureau of Investigation to the Department of Justice.

The Court: That isn't in evidence, you see.

Mr. Pfeiffer: Why don't we argue our motion at the close of our evidence or when they want to have it produced, Your Honor? It might be the best way.

The Court: I think that is the thing to do. As I understand it, both Mr. Boyle and Mr. Werner may be excused providing that they keep themselves available during normal hours to be called by telephone. Is that satisfactory, Mr. Boyle?

Mr. Boyle: That is satisfactory with me, Your Hono[illegible]

The Court: And with you, Mr. Werner?

Mr. Werner: Yes.

Mr. Erickson: Then our procedure would be to notify Mr. Pfeiffer that we would want them to testify as our next witness and he would call them?

Mr. Pfeiffer: I will have them available so they can call them if they would like to.

The Court: Yes, the clerk or the bailiff will call them.

Mr. Pfeiffer: I hope we understand I can't tell my bosses what to do, but I will request that they come up.

The Court: All right; then you gentlemen may be excused subject to being called if you are to testify during the trial. Now it is my understanding that counsel for the Defendant indicated they were going to call Mr. Evensen?

Mr. Pfeiffer: That's correct.

The Court: What do you have with reference to Mr. Mazzulla? Is he present?

Mr. Erickson: Mr. Mazzulla called me last night and I advised him that we would call him at such time as we needed him, and he said he would be at our disposal by telephone.

[fol. 23] The Court: All right, fine.

Mr. Pfeiffer: I will rephrase my statement before and carry it on as an opening statement to the Court, if that is possible, Your Honor.

The Court: All right, sir.

Mr. Pfeiffer: The Defendant was granted an appeal pursuant to regulations. The investigation was conducted by the Federal Bureau of Investigation. A hearing was held before a hearing *office*, Mr. Fred Mazzulla. Mr. Fred Mazzulla made his recommendations to the Department of Justice. The Department of Justice made its recommendations to the State Draft Board and the Defendant was placed in a 1-A classification, the recommendation primarily being that he was in favor of theocratic wars and therefore he was not opposed to war in any form in other matters. Subsequent to that time, why, it was held by the Supreme Court of the United States that a person could be in favor of theocratic wars and still be conscientiously opposed to combatant and non-combatant service, therefore the Defendant's classification was reopened by the Local Board, and the Local Board classified him again 1-A.

On August 3rd 1956 the registrant by letter requested a personal appearance before the Local Board. He was granted a personal appearance before this Local Board and after a meeting, why, he remained in Class 1-A and was notified of such, and he appealed. The Federal Bureau of Investigation then conducted another investigation in regard to the Defendant pursuant to regulations. A hearing was held before Mr. Evensen in Pueblo, Colorado, I believe, and Mr. Evensen made his recommendations to the Department of Justice.

The Department of Justice made his recommendations to the appeal board, and the appeal board classified him in 1-A, and the file was then sent down to the Local Board and notice to report for induction was sent to the Defendant.

The Defendant did appear, I believe, at the induction station here in Denver, Colorado after having been physically examined and found to be fit and refused to take the step forward and refused to submit to induction, and the Government will prove each and every essential allegation in the indictment, Your Honor.

[fol. 24] The Court: Mr. Erickson?

Mr. Erickson: If the Court please, we will reserve our opening statement at this time.

The Court: All right.

Mr. Pfeiffer: Call Mr. Lail.

(Government's Exhibit 3 was marked for identification.)

HENRY LAIL, a witness called on behalf of the Government, testified:

Direct examination.

By Mr. Pfeiffer:

Q. Would you please state your name.

A. Henry Lail.

Q. Where do you live, sir?

A. 2059 Albion.

Q. Denver, Colorado?

A. Yes.

Q. Are you married?

A. Yes.

Q. Do you have a family?

A. Yes.

Q. By whom are you employed?

A. Federal Government.

Q. In what capacity?

A. Deputy state director of Selective Service of Colorado.

Q. How long have you been deputy director?

A. Since April of '49.

Q. How long have you been with the Selective Service system?

A. Since October 16th 1940.

Q. Was there a period there when you were in the service yourself?

A. Yes, sir.

Q. Mr. Lail, I hand you what has been marked as Government's Exhibit 1 and ask you to state whether or not you can identify that?

A. Yes, this is the file and cover sheet of Raymond Gonzales, Jr.

Q. Do you see Mr. Gonzales in the courtroom?

A. Yes, sir.

Q. Whereabouts is he seated?

A. He is seated at the back of the defense counsel table.

Q. Is that the complete file, his Local Board file?

A. This is the Local Board file.

Q. Do you at this stage of the proceedings have custody of that file?

A. I do.

Q. Do you have custody and control of it, is that correct?

A. I do.

[fol. 25] Q. And is it maintained by your office pursuant to regulations, sir?

A. It is held by our headquarters pending the trial.

Mr. Pfeiffer: We will offer Government's Exhibit 1.

Mr. Erickson: At this time, Your Honor, we are going to move to dismiss the indictment and to dismiss the Government's case. The opening statement made by Mr. Pfeiffer failed to state that the Defendant refused to submit to induction or to comply with any of the things charged in the indictment, and for that reason on the basis of what they are to prove, their case is incomplete and they can't prove that he refused to submit to induction.

Mr. Pfeiffer: May it please the Court, I made the statement that I would prove each and every element in the indictment.

The Court: Yes, and he said that the Defendant refused to take the step forward. That may be a colloquial term and the Court understood what he meant. If you didn't why, of course, I would permit him to give it its normal meaning. I recall very well him saying that, that the Defendant refused to take the step forward.

Mr. Erickson: Then we withdraw the motion.

The Court: All right.

Mr. Pfeiffer: We will still offer Government's Exhibit 1.

Mr. Erickson: No objection, Your Honor, provided this is the complete file.

Q. Is this the complete file?

Mr. Covington: May we ask this one question? Is that the original file?

Mr. Pfeiffer: Yes.

Mr. Covington: Do you intend to substitute a photostat? That's the usual procedure of the Selective Service system, I know that.

Mr. Pfeiffer: We have prepared this to leave it in the Court's custody pending the disposition of this case.

[fol. 26] Mr. Covington: When the case is decided you will substitute a photostatic copy?

Mr. Pfeiffer: That's correct.

The Court: All right, Exhibit 1 will be admitted.

(Government's Exhibit 1 was received in evidence.)

Q. I hand you an object there or a photostat. Is that a photostat of the original file?

A. Yes, it is.

Mr. Pfeiffer: I do this for the convenience of the Court and the witness.

Q. Is that complete, sir?

A. So far as I know.

Q. Does that have the—

A. There are some—in the physical examination of papers there are some duplicates, numerous attachments. I don't know that they are all here, but there are some of the main physical examination reports here.

Q. That is in the photostat; in the original are they all there?

A. In the original file they are all there.

Q. Have you reviewed that file? Have you reviewed the file itself?

A. Of Gonzales, yes.

Q. For the convenience of the Court would you please summarize the contents of the file?

A. "Raymond Gonzales."

Q. Just one moment, please. Go right ahead, Mr. Lail.

A. —registered as is required by law on March 17th 1952 at the age of eighteen. He registered at Local Board

No. 9 in Boulder. Following his registration, as is the custom, a Selective Service questionnaire was sent to Mr. Gonzales and he completed the questionnaire and returned it to the Local Board with some other material.

The questionnaire, among other things, indicated that Mr. Gonzales objected to war, and as is the custom the Local Board mailed to him a form for conscientious objectors which he filled out and returned to the Board with some attachments. The Local Board on 11-13-52, November 13th '52, classified Mr. Gonzales in 1-A. At that time in the file there was his completed questionnaire, his position within the Jehovah Witness group so far as his ministerial position was concerned, and the special form for conscientious objectors which he completed. It was on apparently that evidence that the Local Board classified him in 1-A.

[fol. 27] He was so notified. On November 22nd of '52 Mr. Gonzales sent to the Board a letter in which he discussed the classification that he had received from them, and he attached to that some affidavits from members of the Jehovah Witness Sect who set forth their reference so far as Mr. Gonzales was concerned, and his position within the church, and the character references and so forth. Mr. Gonzales asked the Local Board if they would consider classifying him as a minister of religion in 4-D.

The Local Board did review the file as indicated by a classification on December 4th 1952, in which they recognized his objection to both combatant and non-combatant service, and put him in a 1-0 classification. He was so notified of this, and as a 1-0 he was ordered for an armed forces physical examination.

Mr. Gonzales took this examination and was found to be physically qualified. Upon a review of the file the Local Board on July 30th of '53 reclassified Gonzales into 1-A, and so notified him. Mr. Gonzales followed this notice up with a letter to the Board in which he said he was concerned about their classification of 1-A, and he asked if he could appear before the Board, and as is customary the Local Board granted him a personal appearance in regard to this 1-A classification.

At that same time Mr. Gonzales appealed by letter from their decision and the Board made inquiry as to whether Mr. Gonzales wanted the appeal to precede his personal appearance; however, the Local Board wrote to him about that matter and he said that he would like to appear first and if there was no change the file be sent on to the appeal board.

On August 13th of '53 Mr. Gonzales appeared before the three members of the Board, Mr. DeSouchet, Mr. Wencel and Mr. Palmer. He talked with the Local Board and they did not change his classification, but did forward his file on appeal, and the appeal board received the file in August of '53, and as was customary forwarded it on to the Department of Justice.

The Department of Justice in February of '54 sent a recommendation back to the appeal board based upon an FBI investigation, a hearing, and as they had the file the recommendation they made had the backing of these different considerations that were given to Mr. Gonzales' case.

[fol. 28] The Department of Justice, represented by T. Oscar Smith, recommended that his claim be not sustained.

Q. Now, in between the time that the file was sent to the Department of Justice and the time that the recommendation of the Attorney General or the Department of Justice was sent back down through the state appeal board, what transpired in there, sir?

A. Between the time—

Q. Yes, according to regulations what was it that transpired, sir?

A. (No response.)

Q. What I am getting to was an investigation conducted and was a hearing held?

A. Yes, as was indicated in the recommendation an investigation was made.

Q. By whom?

A. By the FBI.

Q. The Federal Bureau of Investigation, is that correct?

A. The Federal Bureau of Investigation.

Q. And then their report was submitted to a hearing officer, is that correct?

A. Yes.

Q. Who was that hearing officer, if you know, sir?

A. Fred Mazzulla.

Q. Was anything sent to the Defendant at this time, sir?

A. (No response.)

Q. At this time was a resume of the report sent to the Defendant?

A. There is no indication that it was in the file.

Q. That it was, all right. Then a hearing was held before the hearing officer, is that correct, and the Defendant was reportedly present, is that correct?

A. That is indicated by the letter from the Department of Justice, yes.

Q. Then the hearing officer made his recommendation to the Department of Justice?

A. Right.

Q. Then the Department of Justice made its recommendation back down to the State Appeal Board?

A. Yes, sir.

Q. And the information that is contained in the file about the hearing and about the FBI report is contained in the letter from the Department of Justice signed by T. Oscar Smith, is that correct?

A. Yes.

Q. All right, sir, and what did the Department of Justice recommend?

A. I might read this: "After consideration of the entire file and record, the Department of Justice finds that the registrant's objections to combatant and non-combatant service are not sustained. It is, therefore, recommended to your board that the registrant's claim for exemption from both combatant and non-combatant training and service be not sustained."

Q. All right, sir, and then what happened after that?

[fol. 29] A. Then the appeal board placed the registrant in 1-A by a vote of three to nothing, and the registrant was so notified. Having been examined and having no further avenue of appeal, because there was no dissenting vote in the appeal board vote, the Local Board ordered

Mr. Gonzales for induction to appear June 11th 1956 at the Local Board for forwarding to an induction station.

Mr. Gonzales did appear, went to the induction station, and during the induction ceremony which constitutes a person's induction into the armed forces, Mr. Gonzales failed to be inducted. He wrote a statement voluntarily that had to do with the reasons why he would refuse to enter the armed forces. Do you care for me to read those?

Q. That is in the file, is it not?

A. That is in the file.

Q. All right.

A. As is customary when a person refuses to submit to induction we are notified, the state headquarters, and on June 14th 1956 we wrote to the Local Board suggesting a procedure they follow that was customary in a case of the person who refused to be inducted. The Local Board sent to the state headquarters the file, and in reviewing the file we noted that they had not reopened the case of Gonzales since a recent decision had been made by our director of Selective Service as it has to do with a Supreme Court decision which was made that has to do with, I believe, theological warfare, as a consideration, and a claim as a conscientious objector, so we directed that the Local Board —that is, the state headquarters directed the Local Board to reopen the classification of Mr. Gonzales, and they did reopen.

They cancelled his order to report for induction, and they again classified him in 1-A. Now, Mr. Gonzales, having been notified of that, again asked if he could appear before the Local Board. The Local Board granted him such appearance, and on August the 17th 1956, Mr. Gonzales talked with the Board about his situation. There is a summary of that appearance in the file. Thereafter Mr. Gonzales was classified in 1-A again and he was so notified.

About that time he told the Board that he was married. Mr. Gonzales appealed from this latest decision of the Local Board, and the Local Board sent the file again to the state appeal board. They in turn forwarded the file to the Department of Justice and a second hearing and investigation was made by Elements of the Department of Justice. The Department on March 21st, I believe it is [fol. 30] here—I can't read that date; it looks like '57, is that right? The Department wrote to the appeal board enclosing a resume of the supplemental questionnaire made by the Department of Justice, and their recommendations in this case. They had held another hearing, and the hearing officer had made a recommendation, and the Department in compiling these two things and the file itself concluded that the claim not be sustained, the claim of objection, and so recommended to the appeal board.

The appeal board mailed Mr. Gonzales a copy of the entire recommendation received from the Department, and Mr. Gonzales did reply to that within the thirty-day period. The appeal board took no further action other than the classification of 1-A, and sent it back to the Local Board who notified Mr. Gonzales of the decision of the appeal board, and on June 3rd the Local Board ordered Mr. Gonzales to appear for induction June 24th '57.

Mr. Gonzales did appear and was forwarded to the induction station, but before he appeared that day he—I will say in the interim, between the time he was ordered for induction and his actual induction date, Mr. Gonzales reported to the Local Board that his wife was expecting a child and he wondered if that would change his status. He also asked if the induction could be postponed, and the clerk at that time of the Board wrote him a letter indicating that the Board was without authority to delay induction when it was because of something that the registrant had control over. In other words, the Board was prohibited from reopening unless it pertained to a condition that was beyond the registrant's control, so reopening didn't take place. The induction order stood and Mr. Gonzales appeared at the induction station and again refused to be inducted, and again made a statement as to why he refused.

Subsequently the file contained papers that have to do with the processing when a man refuses the induction and his subsequent reporting to the Department as a delinquent.

Q. Now, does the file itself contain a resume of what is denominated a resume of the investigative report regarding the second hearing?

A. Yes, it does.

Q. And as I understand your testimony that was mailed to the Defendant prior to the hearing, is that correct, before the hearing officer?

A. Well, I can't tell you that procedure; that was done by the Department, as is indicated in their recommendation to the state appeal board, but they instigated the procedure entirely.

[fol. 31] Mr. Pfeiffer: All right, sir; you may examine.

Cross examination.

By Mr. Erickson:

Q. Mr. Lail, how long have you been with the Selective Service System?

A. Well, since 1940.

Q. And there have been changes made in the regulations from time to time since you went with the Board?

A. A great many.

Q. And you are familiar with those changes?

A. I hope I am.

Q. Do you know the Defendant, Raymond Gonzales?

A. I know who he is.

Q. When did you meet him?

A. Well, I saw him in the headquarters; he talked to Mr. Rouch.

Q. Mr. Rouch?

A. Yes.

Q. And did you discuss his classification at that time with him?

A. No, I did not.

Q. So your sole contact with Mr. Gonzales comes from that meeting, is that correct?

A. That's correct.

Q. What was the date of that meeting?

A. I don't know that.

Q. Was it during 1954, sir?

A. Oh, no, it was more recent than that.

Q. What year was it? Would you be able to tell us that?

A. I would say it was in 1958.

Q. 1958?

A. Yes.

Q. That was subsequent to the time that you completed your testimony regarding the summary of the things that are in the file, subsequent to the time that the Selective Service file was completed, is that right?

A. Well, it is never completed; it is an open file and additions can be made or it can be added to any time.

Q. But the resume you gave ended in 1957 in July, is that correct?

A. The resume I gave?

Q. Yes, sir.

A. It ended—yes, about that time.

Q. So it was after that time that you met Mr. Gonzales, and that was the only time you met him?

A. That's right.

Q. And you weren't present at the time that he had his appearance before the Local Board?

A. No, I was not.

Q. And you don't know what occurred at that time?

A. No, except what is in the file, the summary of the meeting in the file.

Q. In other words, what your testimony is that you are testifying on the basis that the file is before you?

A. Yes, sir.

Q. Now, in your resume you didn't say whether or not the hearing officer's report was part of the file. Is that part of the file?

A. It is only in the summary of the Department of Justice's recommendation to the state appeal board.

[fol. 32] Q. Well, has the file any papers in it to indicate whether or not the hearing officer's report is present there, either the hearing before Mr. Evensen or Mr. Mazzulla? Is that in the file?

A. The hearing itself as recorded is not in the file.

Q. The hearing officer's report is not in the file?

A. That's right.

Q. In 1952 was it not required by your regulations that the hearing officer's report be included in the file?

Mr. Pfeiffer: Just one moment; object to that. I don't see the relevancy of that, Your Honor, what the regulations required in 1952. We are dealing with 1956 here.

The Court: When was the first hearing?

Mr. Pfeiffer: It was 1953, Your Honor.

The Court: The objection is sustained.

Q. In 1952 what were the Selective Service regulations relating to the inclusion of the hearing officer's report in the Selective Service file, do you know?

A. I believe I do. As I recall the hearing officer's report itself was not included in the file after 1954.

Q. After 1954?

A. It was not included in the file.

Q. But prior to 1954 it was included in the file, is that your testimony?

A. I wouldn't say it was, no. It could be that there was a hearing officer's report in the file prior to that time.

Q. Didn't your regulations require it be included in the file prior to 1954?

A. The regulations required a procedure with the Department of Justice that had to do with a hearing and the recommendation, investigation.

Q. But your testimony is that prior to 1954 the hearing officer's report was included in the file?

A. At times it might have been, yes.

Q. Well, at what times was it included and at what times was it not included?

Mr. Pfeiffer: We will object to that. I think the question was as to whether or not the regulations required it, and I think he has answered it to the best of his knowledge. I think he has testified as to what was done in this case.

[fol. 33] The Court: The objection is sustained.

Q. What provision in the regulations are you referring to, Mr. Lail?

A. Well, the provision of the act itself has to do with conscientious objectors, Universal Military Training and Service Act.

Q. I am familiar with that Act, but what particular sections determine whether or not the hearing officer's report would be included in the file or would not be included in the file?

A. The only section in there referring to it has to do with the appeal procedures.

Q. The appeal procedures?

A. I could quote you the section.

Q. That would be fine; would you do that?

A. Would you give me those books?

Mr. Pfeiffer: May it please the Court, to expedite matters it might be best for Mr. Lail to go through the regulations and determine what they are, but I am certain the regulations will speak for themselves, and I will let him go on, but in order to attempt to impeach this witness over regulations they may have forgotten, why, I will object to it on that ground. If they are trying to go to some regulation and get to it we have no objection to it, Your Honor.

Mr. Erickson: We are not endeavoring to impeach him, Your Honor; we are trying to give him an opportunity to correct his recollection.

The Court: The objection is overruled and you may answer the last question, Mr. Lail.

A. With reference to Regulation 1626.25 having to do with special provisions when appeal involves a claim if registrant is a conscientious objector. Now, this regulation may or may not have been in effect at the time of the procedure, but it does give you some idea as to the instructions to the Selective Service system as to procedure when a case involves a claim for conscientious objection. "Whenever a registrant's file is forwarded to the United States Attorney in accordance with Paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character [fol. 34] and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing. He shall have an opportunity to be heard. If the objections of the registrant are found to be sustained the Department of Justice shall recommend to the appeal board, one, that if the registrant is inducted in the armed forces he shall be assigned to non-combatant service, or, two, that if the registrant is found to be conscientiously opposed to participation in such non-combatant service, he shall in lieu of induction be ordered by the Board to perform for a period of twenty-four months civilian work. If the Department finds that the objections of the registrant are not sustained it shall recommend to the appeal board that such objections be not sustained.

"Upon receipt of the recommendation of the Department of Justice the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that within thirty days after the date of such mailing he may file with the appeal board a written reply concerning the recommendations of the Department."

It goes on from there. That is the section that I would presume you refer to.

Q. Do you know what the date of the enactment of that particular regulation was or is?

A. Well, it was included in Executive Order 10659 dated February 15th '56.

Q. Now, prior to that time was it customarily—I used that word as you used it—required by the regulations that the hearing officer's report be included in the file?

A. I don't believe it was, Mr. Erickson.

Q. Do you know when the regulations did require that it be included in the file?

Mr. Pfeiffer: I will object to that; it is assuming that at some time it was.

Mr. Erickson: He has already testified.

The Court: No, he hasn't; the objection is sustained.

Q. Did the hearing officer's report by virtue of the regulation have to be included in the file *as* any time that you know of?

A. That was dependent, I would say, on the resume or the letter or the enclosures that were sent from the Department of Justice to the appeal board, after these different elements of investigation and hearing had taken place. If the Department of Justice included the results of the hearing or the hearing itself in their letter to the Appeal Board, why, it would be in the file. If such was not sent to the Appeal Board it would not be in the file.

[fol. 35]

Mr. Erickson: Would you read the witness the question? I don't believe he answered the question.

(Last question read by the reporter.)

Mr. Pfeiffer: Frankly, Your Honor, according to the witness's explanation I don't know whether he can answer that yes or no as to whether he had—

The Court: He can say whether he can or can't. I don't know; the question is in substance, Mr. Lail: Under the regulations as you know them or remember them since you have been active in this work was it ever necessary to have the hearing officer's report in the file, that is, in the individual's file? Was that substantially your question?

Mr. Erickson: It is, Your Honor; it is well stated.

A. Your Honor, I can only answer that in this way, that the hearing itself is not held by Selective Service; it is held by Department of Justice, and if the Department of Justice wanted the report of the hearing officer to be a part of their recommendation to the Appeal Board, such hearing may be a part of their recommendation, but in handling the numerous cases that are handled I don't recall that it ever has been included in the file, except the ones who have had it come directly from the Department as an attachment.

The Court: Then would your answer to the question be that you don't know of any regulation that required it?

The Witness: That's correct.

Q. Now, the provision you are referring to would be part of 1626.25, is that not correct?

A. Yes.

Q. Now, do you have any records with you that would indicate what the regulations of the Selective Service Act were on June 17th 1952?

A. I may have that.

Q. I might ask you about executive order 10363.

[fol. 36] Mr. Pfeiffer: If it please the Court, I don't see the relevancy of this. June 17th 1952 has no bearing upon this question here. I will object to it on that ground.

The Court: He can answer the question. It may be that they were in effect at the time that ~~he is~~ concerned with here. The objection is overruled.

The Witness: Will you restate the question, please?

The Court: Do you want it read to you?

Mr. Erickson: Perhaps I can rephrase it for him to save some time.

The Court: All right, if you wish.

Q. Now, you are familiar with subdivision (d) or subsection (d) of 1626.25 as it stood on June 17th 1952.

A. Did you say (d)?

Q. (d).

A. Of '52?

Q. (d) of 1626.25.

A. You say as it stood as of 1952?

Q. Yes, June 17th 1952.

A. I don't seem to have that here.

Q. Well, are you familiar with the provision as it stood then or would you know whether or not this was the provision: "Upon receipt of the report of the Department of Justice the Appeal Board shall determine the classification of the registrant and in its determination it shall give such consideration to, but it shall not be bound to follow the recommendation of the Department of Justice and the report of the hearing officer of the Department of Justice"?

A. That sounds like it.

Q. And you were with the Selective Service system at the time that Act was in effect and that particular provision?

A. Yes, would you read that right in there again about the hearing officer?

Q. I would be glad to. "Upon receipt of the report of the Department of Justice the Appeal Board shall determine the classification of the registrant and in its determination it shall give consideration to, but it shall not be bound to follow the recommendation of the Department of Justice and the report of the hearing officer of the Department of Justice." Does that refresh your recollection?

A. That has reference to the recommendation by the Department of Justice, which includes the resume of the report of the hearing officer.

[fol. 37] Q. What was that?

A. I say, I would think that may not have reference to an actual individual report other than the report included in the Department of Justice letter which refers to the hearing that was held. It is inclusive.

Q. That particular provision was in effect for some years, was it not?

Mr. Pfeiffer: Just one moment, Your Honor. I don't think it is before the Court that that provision was in it.

Mr. Erickson: He stated it.

Mr. Pfeiffer: It is a matter of law, and I think we should have something to show that it was in there at that time.

The Court: The objection is sustained.

Q. Now, you have given a summary of the Selective Service file earlier this morning, is that correct?

A. Yes, sir.

Q. And you have included in that summary everything that you believe is important to the case, is that correct?

A. Well, I followed to the file closely.

Q. Did you include everything in the summary, all hearings that took place, all notices that were sent?

A. I tried to outline the events that were important procedural-wise, I would say.

Q. In your opinion?

A. In following through the file.

Q. Now, you stated that on July 9th 1953 the Board reviewed the file of the registrant in this case and found him fully acceptable, I believe?

A. July 9th 1953. On July 9th 1953 he was mailed a certificate of acceptability showing he was acceptable to the armed forces.

Q. And on July 30th 1953 he was reclassified, is that correct?

A. That's correct.

Q. His classification was changed from 1-0 to 1-A, is that correct?

A. Yes.

Q. On what basis was that done, do you know?

A. I have no way of knowing that.

Q. Pursuant to what regulation was it changed? Was there a hearing?

A. Before it has the authority to reopen at any time.

Q. Was any notice given to the Defendant that they were going to reconsider his file, or how did they come to review the file as of that particular date?

A. Well, I don't know why they reviewed the file, but it is a custom in all Local Boards to review periodically [fol. 38] all files, and the Local Board has the authority to reopen at any time on its own motion.

Q. So you don't know why they reviewed at that time?

A. I have no idea.

Q. Now, you stated that on February 1st 1954 there was a recommendation included in the file from the Department of Justice?

A. That date again?

Q. February 1st 1954.

A. Yes.

Q. Now, on that date does the file reflect that any of the reports that are referred to by the Department of Justice or by the Federal Bureau of Investigation are part of the file?

A. Does the report so indicate?

Q. Yes.

A. The report refers to the hearing and attaches a resume of an investigative report.

Q. Now, as I understand it your testimony was that the resume was not mailed to the Defendant in this case, is that correct, a resume of the report of the first hearing before the hearing officer?

A. I would have to refer to the regulations in effect at that time.

Q. Now, not the regulations, but the file. The file indicates that it wasn't mailed, does it not?

A. The file indicates that it was not mailed.

Q. That was not mailed?

A. Yes.

Q. There are no reports of the FBI in the file, are there?

A. No, sir.

Q. Now, throughout your testimony you used the word "customary" from time to time, something being customary in accordance with the Local Board's practice. By that you mean what is required by the Selective Service Act, isn't that correct?

A. Policy, procedure, regulation.

Q. Now, you stated that on June 29th 1956 the registrant's classification was reopened, and I believe you stated something about theocratic war?

A. Yes.

Q. Now, that classification was reopened on the basis of your Selective Service regulations, isn't that correct, and operations in Bulletin 123, isn't that why it was reopened?

A. Right.

Mr. Erickson: No further questions at this time.

The Court: Anything further, Mr. Pfeiffer?

Mr. Pfeiffer: I have nothing further, Your Honor.

[fol. 39] STIPULATION OF COUNSEL

Mr. Pfeiffer: May it please the Court, I think we can enter into a stipulation of fact with counsel for the Defendant that on June 24th 1957 the Defendant did report to headquarters, U.S. Army recruiting main station, 101 Old Custom House, 16th and Arapahoe Streets in Denver 2, Colorado, in the State and District of Colorado, pursuant to an order. He did report there and did fail, refuse and neglect to submit to induction into the armed forces on that date, Your Honor.

Mr. Erickson: We will stipulate, Your Honor, that on June 24th 1957 the Defendant, Raymond Gonzales, refused to submit to induction. We will stipulate no further.

Mr. Pfeiffer: Submit to induction into the armed forces of the United States?

Mr. Erickson: Into the armed forces of the United States at Denver, Colorado.

Mr. Pfeiffer: All right, sir. I believe the Government rests, Your Honor.

The Court: All right.

Mr. Erickson: If it please the Court, at this time we would like to reserve the motion that we have for a directed judgment of acquittal and at the same time waive our opening statement and proceed and open our case.

The Court: All right.

Mr. Covington: May it please Your Honor, we at this time will call the hearing officer, Mr. Evertsen, to the stand.

Maurice Evensen, called as a witness on behalf of the Defendant, testified:

Direct examination.

By Mr. Covington:

Q. Will you please state your full name, sir.

A. Maurice E. Evensen.

Q. Mr. Evensen, what official position if any do you hold with the Department of Justice and did you hold with the Department of Justice during the year 1957?

A. Hearing officer.

[fol. 40] Q. For what district?

A. For Colorado.

Q. Where did you maintain your office for the purpose of holding hearings?

A. In Pueblo, Colorado.

Q. Now, are you familiar with the Defendant in this case, Mr. Gonzales?

A. I have met him on one occasion prior to this morning.

Q. When was it, please, that you first got acquainted with him, first saw him?

A. I first saw him on January the 7th, as I recall, 1957, at the Federal Courtroom in Pueblo, Colorado, when he appeared before me as a hearing officer.

Q. Now, Mr. Evensen, would you please tell us what took place on the occasion of that hearing?

Mr. Pfeiffer: May it please the Court, we will object to further interrogation along this line. It is not the question for this Court to determine what transpired there; we are not reviewing that hearing, and therefore we don't think it is relevant to the issues in this case.

Mr. Covington: May I reply, please, Your Honor? We propose to show and at the close of the case one of the grounds of our motion for judgment of acquittal will be that there was a denial of procedural process of law upon the occasion of this oral hearing conducted by Mr. Evensen, and then also we propose to show and also raise as one of the grounds of our motion for judgment of acquittal that the Department of Justice withheld from the Appeal

Board certain favorable evidence that was given by the Defendant at the hearing, and it is because of these two points which constitute defenses that this evidence that we are now about to develop is relevant and material.

The Court: The objection to the last question will be overruled.

Q. Now then, you will please tell us what took place upon the occasion of that hearing. Tell us first where it took place and approximately the date, and then what took place step by step as you can recollect it.

A. All right. As I recall this took place approximately January the 7th of 1957 in the Federal Courtroom in the Post Office Building in Pueblo, Colorado, when the Defendant appeared before me pursuant to the notice which I had previously sent him for hearing upon his claim of being a conscientious objector.

Q. Go ahead, sir.

A. He appeared accompanied by his wife and two witnesses which he brought with him. At that time I asked Mr.—

[fol. 41] Mr. Pfeiffer: Now, may it please the Court, I don't see why we should go into the substance of what was said, and I will object to what the individual said to him and what he said to them. If we permit this we are just going into a retrial.

The Court: I don't propose that we have a review of the hearing, but just in substance I am interested in what procedures were followed or were omitted. The detail of what was said back and forth only so far as it may pertain to the procedure that was followed, but the questions and answers that were asked in substance to determine whether or not in your opinion he was entitled to the claim of exemption or classification, I will sustain the objection as to that. It is my *understand* that Mr. Evensen is a lawyer, isn't that correct?

The Witness: That is correct, Your Honor.

The Court: So I think he understands my ruling.

Q. I am sorry I forgot to develop that when I was questioning you at the outset. You are a member of the bar of the State of Colorado, are you not?

A. That is correct.

Q. How long have you been engaged in practice?

A. Since 1942.

Q. Now, would you tell us what the procedures were that were followed at this hearing?

A. Do you want me to go back prior to the hearing or just at the hearing?

Q. You have already told us about mailing him a notice and sending him a copy of the resume of the FBI investigative report?

A. Yes.

Q. That was made in 1956; but, now I am just merely interested in the procedures that took place from the time the hearing began there in the courtroom in Pueblo.

A. All right; the Government does not furnish a stenographer for these hearings, so there was no stenographic report made. Mr. Gonzales, the Defendant, first was given an opportunity to present his views on his claim of being a conscientious objector. After that was completed the two witnesses that he brought with him also were allowed to testify. As I recall his wife did not testify. After the hearing I made my report and my recommendations and sent them to the Department of Justice.

Q. Now, Mr. Evensen, you had therefore familiarized yourself with the draft board file by examining it, had you not?

A. Yes, sir.

Q. And did you see or have you ever seen a copy of the recommendation that the Department of Justice made to the Board of Appeal in this case following your appearance and your report?

[fol. 42] A. Yes, I have.

Q. You are also familiar with that report wherein the Department recommended that the Defendant be denied his conscientious objector classification purely because the records showed and the investigative report showed that this man had exaggerated the number of hours to his ministerial duties, is that correct?

Mr. Pfeiffer: Just one moment; I don't think—

Mr. Covington: I would like to say this, Your Honor, that this question is asked preliminary to a development of procedural due process.

The Court: Counsel has a right to object.

Mr. Covington: Yes, I just thought I would state that.

Mr. Pfeiffer: I don't think that the report from the Attorney General reflects that statement that it was purely on the basis of that, Your Honor.

The Court: Is it a part of the file?

Mr. Pfeiffer: It is a part of the file.

Mr. Covington: It is a part of the file, Your Honor, and I will refer to it now. On page four of the recommendation of the Department of Justice to the Appeal Board the following is stated:

"On the other hand, the registrant's claim as to the amount of religious activities is so highly exaggerated, if we are to believe the official records of his religious organization as reported in the resume and recapitulated above, as to cast doubt upon his veracity and consequently upon his sincerity and good faith; therefore, with due regard for the hearing officer's recommendation the Department of Justice finds that the registrant's claim is not sustained."

Q. Now, the point that I want to ask you is whether or not upon the occasion of that hearing you brought up with him and discussed with him the so-called exaggerated statements as to his religious activities appearing in the investigative report and the resume?

A. I don't recall that.

Q. You do not recall, or do you say positively that you did not or did? Can you tell us whether you have any recollection or just—

A. I don't have any recollection at this time.

[fol. 43] Q. Is it possible that you could have discussed this with him?

A. It is possible all right.

Q. But do you have any recollection as to whether you did discuss it with him or not?

A. No, I do not.

Q. So you will not tell us that you did, will you?

A. No, sir, I will not.

Q. Now then, you were served with a subpoena duces tecum to produce in this court your longhand notes as well as your stenographic or typewritten report of the hearing to the Department of Justice in Washington, is that not correct?

A. That is correct.

Q. You were served with that subpoena duces tecum?

A. Yes, sir.

Q. And you have appeared here in response to that subpoena, have you not?

A. Yes, sir.

Mr. Covington: Now, may it please the Court, we call upon the United States Government to produce the longhand notes as well as the typewritten report for our purpose to develop, if possible, by further examination of this witness, who has been subpoenaed, to develop whether or not the basis of this adverse recommendation, namely, the highly exaggerated statements as to his religious activities, was brought to the attention of the Defendant at the hearing and he was given an opportunity to answer at that time.

Q. Will you please produce the report, Mr. Evensen?

Mr. Pfeiffer: If it please the Court—

Q. As well as your longhand notes and other documents called for in the subpoena duces tecum.

Mr. Pfeiffer: If it please the Court, at this time we will move—I think it has been established.

Q. Mr. Evensen, what records do you have with you that you brought with you, sir?

A. Let's see, I have the complete file on Mr. Gonzales, that is, my complete file on Mr. Gonzales, consisting of—

The Court: Excuse me a moment. Do you have a copy of the subpoena duces tecum? I will suggest the witness answer which of the requests in the subpoena duces tecum he has.

Mr. Pfeiffer: All right, sir.

[fol. 44] The Witness: Number one, I have the notes made by me. Your Honor, I just noticed this says, "Notes on the hearing conducted on the 20th of October, 1953." I don't have any notes like that. I was not a hearing officer at that time.

Mr. Covington: We will stipulate that that is an inadvertent statement.

Mr. Pfeiffer: Yes, I think you would like to amend your subpoena to read whatever date you held your hearing.

The Witness: Yes, I have the notes made by me on January 7th, 1957.

Mr. Pfeiffer: Let the record show that the subpoena was so amended.

The Court: All right, that is satisfactory, Mr. Erickson?

Mr. Erickson: We would like to amend to set forth the date that Mr. Evensen has testified to.

Mr. Pfeiffer: We have no objection.

The Court: All right.

The Witness: Item No. 2, stenographer's transcript of the questions and answers of the registrant Raymond Gonzales. I act as a hearing officer without compensation and the Government does not furnish me a stenographer, so I have no such notes.

No. 3, copy of the resume or summary of the Federal Bureau of Investigation report mailed to the Defendant Raymond Gonzales. I do not have that; that is sent to me in duplicate. One copy I mailed to Mr. Gonzales with the notice of the hearing; the other copy went in with my report to the Department of Justice.

No. 4, copy of the report of the hearing conducted by me and mailed to the Attorney General in Washington, D.C. on the conscientious objections of Raymond Gonzales. I do have a carbon copy.

No. 5, all correspondence relating to the Defendant Raymond Gonzales; all reports made by you on or concerning the Defendant Raymond Gonzales regarding his classification for military service.

[fol. 45] The only report which I made was the one covered in No. 4.

I have no letters written by me concerning Mr. Gonzales. I do have one letter from the Department of Justice in Washington, D.C. along with the letter which was sent to the Appeal Board.

No. 6, all documents, instruments, opinions and information related to, concerning or in any wise involving the Defendant Raymond Gonzales, regarding his classification for military service. I have nothing other than what I have already reported.

The Court: So that the record will be clear as to the items that the witness does not have, does counsel intend to interrogate him concerning those matters?

Mr. Covington: We will stipulate this, Your Honor, so as to narrow this issue down: We have, of course, a copy of the letter that the Department of Justice mailed to the Appeal Board which Mr. Evensen mentioned as the last item he had. We do not have a copy of his longhand notes, and we do not have the carbon copy of his report to the Department of Justice, and of all the items mentioned by Mr. Evensen that are called for by the subpoena, the only two that we now demand and request that he produce, one, his longhand notes and, two, his carbon copy of his report to the Department of Justice pursuant to the subpoena. All other items called for in the subpoena are—we do not have a copy, however, of the letter that was written by the Department of Justice to Mr. Evensen transmitting the letter to the Appeal Board, and I would like to ask this one question, if I may, to clarify it:

By Mr. Covington:

Q. Mr. Evensen, when you mentioned the letter in your testimony about the letter that was sent to you by the Department of Justice that was attached to the letter that was sent to the Appeal Board, you mean the letter of recommendation that went to the Appeal Board that appears in the Draft Board file, is that correct?

A. That is the attachment to the letter, yes, sir.

Q. That is the letter, so that clarifies the matter, and the letter that you received by way of transmittal is just a transmittal letter, is that correct?

A. That's right.

Mr. Covington: Your Honor, we limit our request to the two items that I have suggested to the Court, the longhand notes taken by Mr. Evensen at the hearing, and the [fol. 46] carbon copy of his report to the Department of Justice, and these two items are called for for the limited purpose of establishing the defense that the Defendant is making and intends to raise in the motion for judgment of acquittal, that he was not notified of this position taken by the Department of Justice at the time of the hearing so that he might answer it at the hearing, namely, that his hours had been highly exaggerated, and that's the limited purpose for which we want it. Is that all right with you?

Mr. Erickson: Yes.

Mr. Covington: All right, that's it, Your Honor.

Mr. Pfeiffer: If it please the Court, in regard to the copy of the report that was sent back to the Department of Justice, we assert that it is a confidential paper of the Department of Justice and that it is not subject to being produced. I was thinking that the notes that are made pursuant to that should be in the same category, and I think it has been shown here that the notes are taken by Mr. Evensen so that he can prepare his report to the Department of Justice; but, in the case that it cited in our motion to quash, Moses vs. United States, arising out of the Western District of Oklahoma, Tenth Circuit case reported in 251 F. (2d) 728, I believe the Court of Appeals has held that reports of the FBI and reports of the Department of Justice are confidential, but also in that case I might for the benefit of the Court state that I believe Mr. Evensen was the hearings officer in that case also, is that correct, Mr. Evensen?

The Witness: That is correct.

Mr. Pfeiffer: And he took the witness stand in that case, had his notes in his hand, but did not refer to them, as I understand it from a reading of the case, and in his testimony was asked to produce them. On the ruling of Jencks vs. United States, why, the Court of Appeals held that they were personal papers and not subject to production as a written instrument.

The Court in effect holds that they are not Government property, that they are personal property, but I don't see how they could be relevant to the issue that counsel asserts here, in that the notes were not sent back to the Department of Justice, and the only thing—I think what counsel is asserting—is that the report itself may have something [fol. 47] in it that was not conveyed to the Appeal Board or it may neglect to have something, fail to have something in it, and it would be the report back to the Department of

Justice which is the only thing that would be material o relevant, it seems to me.

As to the notes, they are taken in this person's hand According to this case the Tenth Circuit Court of Appeals has said that they are personal notes, but it would appear to me that the notes were taken pursuant to instruments, notes that were taken to prepare the report that goes back to the Department of Justice.

It would be analogous to the situation where an FBI agent or any type of agent goes out and investigates. He does not take the typewriter with him and make the report there. He does take notes. To say that his notes are private property and say that the report was confidential, it seems to me, Your Honor, that notwithstanding the assertion in this case that the notes themselves are personal property of this witness, that it would appear to me that the notes themselves were taken by this man; but, that they were taken pursuant to his directions to prepare this report and make his recommendations back to the Department of Justice, and I think the case holds that those reports would be confidential.

I do not know whether the Court is familiar with the Bouziden case or not. I do not want to read it to the Court at length if you have read it.

The Court: I have read it, but I don't know that the particular points that are raised there are concerned here.

Mr. Pfeiffer: I am not aware as to whether counsel was asserting in that case—I imagine that Mr. Covington can tell you, because I note that he is counsel in that case, and he is probably more aware of the actual fact in there than I am in that I have just read the case; but, it would appear to me that they are trying to get indirectly what they can't get directly.

The Court: It is a different approach that they are asking for today.

Mr. Pfeiffer: That's correct, sir. In that case they just demanded them at the time of trial. They didn't file a subpoena, but in the case relied upon by the Court of Appeals for the Tenth Circuit in the Blalock case vs. The United [fol. 48] States, and I believe Mr. Covington was in that one also, I think that they did file a subpoena duces tecum and the Court did quash the subpoena, and the Court of Appeals did uphold that one.

Therefore, we would assert that the notes together with the report itself is something that he does in an official capacity and is confidential and *is* went back there to the Department of Justice and is not subject to production, and relying upon the Blalock case and the Bouziden case, Your Honor.

Mr. Covington: May it please Your Honor—go right ahead, sir.

Mr. Pfeiffer: I just wanted to add as far as facts are concerned, Your Honor, if the Court will refer to the resume of supplemental inquiry to Raymond Gonzales, which has been testified to, the third paragraph seems to indicate what the letter refers to, so I think that the basis of his motion is that it was not brought to his attention, where the statement right there shows that it was reported by the congregrational servant that he worked an average of six and a half hours per month, the third paragraph, Your Honor.

Mr. Covington: May it please Your Honor: I neglected to mention one point or reason we also want in evidence these two documents, and it is also for the purpose of showing that the Appeal Board denied Defendant procedural due process of law by withholding favorable evidence that the Defendant gave at the hearing, which was reported by the hearing officer, who made a favorable report; so rather than try to restrict myself to the purpose of demanding the two documents for proving only that the matter of exaggerated hours was called to his attention, we also want to add we want it for the purpose of showing that when the Department of Justice made its written recommendation to the Appeal Board that they withheld favorable evidence that the Defendant gave at the hearing that exculpated him from the adverse recommendation that they gave, inasmuch as Mr. Evensen, his report, and the Department, their recommendations, have made a favorable recommendation on behalf of this man, as far as his sincerity is concerned, and in answering counsel's statement that this information appeared in the third paragraph of the resume or the recommendation, we must bear in mind that the Defendant was mailed a copy of that resume before the hearing. Then after the hearing he gets a copy of the recommendation and a copy of the resume again.

[fol. 49] It is true that he had notice of this at the time that he had the hearing, but inasmuch as the Department of Justice relied specifically upon that exaggeration of ours, we would like to show and find out whether or not this was drawn to his attention, and if it was not drawn to his attention by the hearing officer at the hearing orally, why not?

I would like to distinguish the Bouziden case from the case at bar. On page 732 the record showed—and incidentally the Bouziden case was tried before the District Judge before the Jencks case was ever decided by the Supreme Court—but at that time I limited the purpose of calling for these longhand notes, and incidentally the opinion here doesn't deal with the report of the hearing officer to the Department of Justice. The opinion deals only with the longhand notes; but, in any event the purpose of those documents in the Bouziden case was for the purpose of impeaching Mr. Evensen in the trial at Oklahoma City; but now, you see, I am calling him for these documents for an entirely different purpose, namely to establish an affirmative defense and not for the purpose of impeaching Mr. Evensen, He has been subpoenaed as a witness. He obviously has evidence that is relevant to these two propositions of defense that we want to advance in our motion for judgment of acquittal.

It is true that we can develop this from the Defendant, but the Defendant's testimony is, of course, his credibility; everything is at stake in a trial being a Defendant, a party to the dispute, and we would like to corroborate by the testimony of Mr. Evensen as well as the documents that Mr. Evensen prepared and which are called for in the subpoena duces tecum. I might say that as far as the Blalock case is concerned in which I appeared as counsel, the subpoena duces tecum in that case dealt only with the FBI report and did not reach this matter of the hearing officer.

I might also add that at the present time there is pending before the Fourth Circuit Court of Appeals since the case was submitted last June, June 2nd, the case of Mankie vs. The United States, in which I asked the Fourth Circuit to reconsider their opinion in the Blalock case on the grounds that it was erroneously decided, being that they had a misapprehension of the Nugent case which did not deal with the question, and unfortunately the Tenth Circuit Court of Appeals followed that decision. It had come down and had been rendered. Inasmuch as the Fourth Circuit [fol. 50] is reconsidering the Blalock situation and since the Bouziden case is based upon Blalock, and inasmuch as I am calling here for an entirely different purpose, I believe that the objection that the United States Attorney has made at this time ought to be overruled, Your Honor. Is there anything you want to say, Mr. Erickson?

Mr. Erickson: No.

The Court: It appears to the Court that the evidence you seek to elicit for the purpose which you seek to elicit it may be obtained by merely questioning the witness who is on the stand. He is here; he has his notes. He can refresh his memory from his notes if he wants to, and he can answer the questions, so therefore the Court will sustain the objection, that is, the objection of the Government, and will grant the motion to quash the subpoena duces tecum as it applied to this, that is, that was served on the witness as to paragraphs numbers one and four thereof. He may retain them.

Mr. Covington: I am not through with the witness by any means, and I am in harmony with the ruling of the Court. Now, I want the witness to refresh his memory—

Mr. Pfeiffer: Just one moment here. I would like to know if the witness wishes to refresh his memory *of* not. If he does, why, that is quite all right.

The Court: He may not need them to refresh his memory. That is a matter that the witness himself will have to determine.

Mr. Covington: I agree with you, Your Honor.

The Witness: I might say that I have no specific recollection of the hearing itself, so if I am to testify about what I could I would have to refresh my memory.

By Mr. Covington:

Q. That's good. Then would you like also to see your typewritten report of the hearing, Mr. Evensen, a typewritten report of the hearing?

Mr. Pfeiffer: I am afraid, Your Honor, that if that is the case, this typewritten report—you can see the position if he does refresh his recollection from these notes. I think counsel is entitled to see them, and we have instructions from the Department of Justice not to permit him to see his notes.

[fol. 51] The Court: Wait a minute, not to see his notes?

Mr. Pfeiffer: No, not to produce—

The Court: I said he would not have to produce them. I have already ruled; the subpoena is quashed, but he has the notes and following the Bouziden case on that, if he can develop properly, subject of course to your timely objection, the fact that this Defendant was denied any of his constitutional rights, his procedural rights which would affect his constitutional rights, due process, he has a right to develop that if he can. That's the ruling of the Court, but I am not permitting counsel to examine—you see, this is his witness; it is not your witness. It is not a Government witness. The Jencks ruling and so forth doesn't apply.

Mr. Pfeiffer: All right, sir.

The Court: You may proceed, Mr. Covington.

Q. Now, Mr. Evensen, I believe I heard you tell me in answer to the question I put to you that you would like to see the typewritten report that you made to the Department of Justice to aid in refreshing your recollection inasmuch as you have heretofore testified you have no independent recollection of what occurred here?

A. Yes, I might as well have my entire file.

Mr. Pfeiffer: Your Honor, I wonder if we could recess at this time and convene at 1:00 o'clock so I could advise myself as to which way to proceed in this action. I think it would be all right, but then again I would like to advise myself.

The Court: In the meantime you will let him have his file?

Mr. Pfeiffer: That's right, I will.

Mr. Pfeiffer: If it please the Court, prior to any further interrogation of this witness we would like to object at this time to any interrogation with regard to the hearing itself on the grounds it is not relevant to the issues here at hand. As I understand counsel's statement, he believes or he is asserting that there may be information that was taken at the hearing that was not transmitted to Washington or the Department of Justice, or there was information obtained and transmitted to Washington that was [fol. 52] not sent down to the State Appeal Board. It seems to me that that is not a denial of a procedural right. Here we are concerned only as to whether or not the Defendant was denied a procedural right. I think it has been established so far that he had a hearing and he had witnesses there. As to what this hearing officer asked the witness or what the Defendant said to him or whether it was or was not said it seems to me is not a question that can be raised in this proceeding, and therefore we will object to it on that ground.

Mr. Covington: May it please Your Honor, in answer to the statement that it is not a denial of procedural due process, we take issue with that. It is well established by many decisions of the Court that the withholding by an administrative agency or hearing officer or a trial examiner, like in the National Labor Relations Board or any other hearing officer of any administrative agency that withholds evidence from the agency, that that is definitely a denial of procedural due process in violation of the Fifth Amendment, the due process clause of the Fifth Amendment. Also I would like to direct Your Honor's attention to the fact that the act itself has the fair and just provisions in it and Congress said that all these selections must be in a manner that is fair and just; and one of these proceedings, therefore, is whether or not a thing is fair and just, and manifestly if a man has submitted evidence at a hearing that exculpates him from the adverse recommendation that is made by the Department of Justice to the Appeal Board, that that itself per se is the denial of procedural due process, but I believe what he is doing here is putting the cart before the horse.

It is for the Court to decide whether or not there is a denial of procedural due process, and that can only be done after evidence is heard on the question, and to suggest to the Court that it is not a denial of procedural due process is to decide the issue before it has been heard. The only way that we can prove this is by the witness, and since it is the only way that we can prove it, then I submit respectfully that the Constitution, the procedural due process for full hearing in the District Court, whereas the only opportunity we have now to inquire into this matter demands that we be permitted to pursue this matter further, and I am not limiting myself to prove that there was favorable evidence withheld from the Appeal Board. That's only one of my points.

[fol. 53] As I mentioned to the Court, I have another reason for getting this evidence, and we respectfully submit that the ruling that the Court made prior to the noon recess ought to be adhered to.

Mr. Pfeiffer: If I might, Your Honor, I would like to read one statement from the Bouziden case. I have stated before it is 251 F.(2d) at 728. At 730 the Court said:

"Appellant sought the production of the complete investigative reports in the trial of his criminal prosecution for failing to submit to induction after having been so ordered by his Local Board. Therefore, he avers that the question is not whether the hearing was conducted by the Appeal Board in accordance with the standards of due process, as in Nugent, but rather goes to his right to those records in defense of a criminal action in an attempt to show that the order of the Board was baseless in fact and hence unlawful."

The Court said that he could not have those records, and it seems to me that the only question that they are trying to show here is that the evidence that was before the

Board may have been incorrect or could have been refuted, and therefore the order did not have a factual basis. I mean, there was not a basis in fact for the order, and it seems to me it is strictly a question of fact here and not a denial of a procedural right.

The Court: Mr. Pfeiffer, it occurs to the Court that you may be anticipating something. I presume you know what the witness is going to testify to. The Court has no idea what the witness is going to testify to; we do not have a jury so that we don't have the problem here of having evidence which possibly should not have been admitted, or maybe should not have been admitted, heard by the jury.

Mr. Pfeiffer: That is correct, Your Honor.

The Court: I don't know what this man is going to testify to. He might say that this fellow came in and told him all this and he just didn't like the fellow, so he sent in an adverse report without any regard to it. I am not suggesting that that's what Mr. Evensen is going to say, because I don't know what he is going to say; but, I think under the circumstances the Court should hear it.

[fol. 54] Mr. Pfeiffer: All right, sir.

The Court: I am not going to substitute my judgment for that of the Draft Board or the Appeal Board or Mr. Evensen or anybody else who had an administrative function. All I am concerned about with this inquiry is whether or not this Defendant was denied any procedural rights which would in effect, in legal effect, deny him due process of law which he is guaranteed by the Constitution.

Now, you may feel perfectly free to object to specific questions as this line of questioning is developed, but I don't know what he seeks to elicit and I have no idea what the answers are going to be; so at this point the original ruling will remain. You may proceed, Mr. Covington.

Mr. Covington: Thank you, Your Honor.

Maurice Evensen, a witness called on behalf of the Defendant, resumed the stand and testified further:

Direct examination.

By Mr. Covington (Resumed):

Q. Now, Mr. Evensen, since we adjourned before noon have you had an opportunity to look over the two documents that you called for, your longhand notes as well as the typewritten report of the hearing officer to the Department of Justice so as to refresh your recollection and memory as to what occurred at the hearing?

A. I have referred to my longhand notes to refresh my recollection.

Q. Have you looked at the typewritten report?

A. No, I have not.

Q. Have you studied it over at any time since you have been here in Denver in response to the subpoena?

A. My typewritten report?

Q. Yes.

A. No, I have not.

Q. Now, tell me whether or not you brought up at that hearing with the Defendant anything about his having exaggerated his hours in respect to his preaching activities as one of the Jehovah's Witnesses?

Mr. Pfeiffer: Your Honor, we will enter an objection to that in that it is not relevant. We feel that it is not the duty [fol. 55] of the hearing officer to elicit information from him, and we will object to it on that ground.

The Court: The objection is overruled; you may answer, Mr. Evensen.

A. I find that I went into considerable detail as to what he did for a living. Then I went into his religious activities in considerable detail again as to what he did in that line, but as to any specific number of hours in either type of activity I find nothing.

Q. So as a matter of fact you can tell us that at the hearing you did not go into this with him about his exaggeration of the hours that he devoted to his ministerial activities, is that correct?

A. (No response.)

Q. Can I take that as being true based on what you have told us here?

A. I believe that is correct.

Q. Yes, sir. Now, you have seen or do you have the recommendation of the Department of Justice to the Board of Appeal?

A. Yes, I have seen that.

Q. And you have before you also the typewritten report of the hearing officer of the Department of Justice?

A. Yes.

Q. You will please turn to the summary of the report of the hearing officer of the Department of Justice as it appears in two paragraphs in the recommendation to the Board of Appeals by the Assistant Attorney General, Mr. T. Oscar Smith, and compare it with the report of the hearing officer and tell us whether or not there are matters appearing in the report of the hearing officer that were not called to the attention of the Appeal Board relating to the conscientious objector claim and sincerity of the Defendant?

Mr. Pfeiffer: I think I will have to object to that, Your Honor, in that it is going into the report itself.

Mr. Covington: Is that all, Mr. Pfeiffer?

Mr. Pfeiffer: Yes.

Mr. Covington: I would like to say this in response to that objection, may it please the Court: One of our grounds of defense and one of our grounds for judgment of acquittal relates to this very matter as to whether or not the Department of Justice made an adequate and full report of the hearing that was conducted, which is a hearing that [fol. 56] is required by statute, and which hearing must be fair and just, and the report of the hearing by the Department of Justice to the Appeal Board is required by statute; and the purpose of this interrogation and pursuit of this inquiry is to develop as a fact that the Department of Justice in Washington in making its recommendation to the Appeal Board did omit important favorable matters that had occurred at the hearing that do not show up in the recommendation of the Department of Justice, and this is the only way that we can prove this point.

Mr. Pfeiffer: If that is the assertion we will have to object further in that a proper foundation has not been laid for the question.

The Court: The Court has previously ruled that one of these documents, the report that was made by Mr. Evensen, would not have to be furnished to counsel or to the Defendant. Now, I did say that he could use that document to refresh his memory, but I do not propose that that would be compared, that the document itself would be compared with some other document, because that is being used to refresh his memory and that's the limited use, because the subpoena duces tecum was quashed.

Mr. Covington: Your Honor, in compliance with that I will ask this question:

Q. Mr. Evensen, without referring to the report that you made to the Department of Justice are you in a position, relying on your memory without any reference to it, to tell us whether or not that two paragraph summary of your report left out matters that appear in your report?

Mr. Pfeiffer: Same objection, Your Honor.

The Court: The objection is sustained.

Q. Do you need to refresh your memory in order to answer my question?

Mr. Pfeiffer: I object to the question, Your Honor.

The Court: The objection to the question has been sustained.

Mr. Covington: May it please Your Honor, I at this time ask the Court to reconsider the ruling that has been made [fol. 57] quashing the subpoena commanding the production of the longhand notes and also the report of the hearing officer, and also the ruling that the Court has made excluding those two documents from being used, and also denying counsel the right to see them, on the grounds that the ruling abridges and denies the Defendant the right to develop his defenses and be heard in defense to the indictment contrary to the Fifth Amendment to the United States Constitution, and this is a point that was not raised in the Blalock case. It is a point that was not raised in the Bouziden case as far as the due process clause is concerned.

It is well known that if a man has a defense he ought to be allowed to make it. As I have stated for the record here, this man has no other way of making this defense except in the manner that we are attempting to pursue it, and I ask the Court, and I do it with deference and with respect to the ruling that the Court has made, to reconsider and set aside the ruling and overrule the motion to quash, and set aside the ruling excluding these documents, and set aside the ruling that the Court has made denying counsel the right to see them, on the ground that the Defendant is denied the right to make his defenses contrary to the Fifth Amendment of the United States Constitution.

The Court: The motion will be denied.

Mr. Covington: Now, I offer into evidence for the purpose of completing my bill of exception to the ruling of the Court so that the Court of Appeals may be in a position to adequately pass upon this question, the longhand notes of the hearing officer and the report of the hearing officer, and ask that they be made a part of the bill of exceptions so that I might complete my bill of exception to the ruling that the Court has made, and that they be included in the record.

The Court: Do you have anything to say with reference to that, Mr. Pfeiffer?

Mr. Pfeiffer: We will object to their being offered in evidence, but as far as being sealed with the Court, I don't know why they should be. I understand you want an in camera inspection?

Mr. Covington: No, I don't want an in camera inspection. My request is this, may it please Your Honor: That I am entitled to have a hearing in the appellate court on [fol. 58] the exclusion of evidence, and it is a fundamental rule of law, procedure, that counsel must follow in order to bring a good bill of exception on the exclusion of documents from evidence before the appellate court that the documents be made a part of the bill of exception in order that the bill of exception be complete, and may it please the Court, until the documents are included there cannot be a full review of this matter in the Court of Appeals, and we are entitled now to make an exception.

We are entitled to have it reviewed in the appellate court in the event the decision of the Court is adverse on the merits of the case, and we request that at this time.

The Court: I don't think that it is either required or proper. If the Court erred in granting the motion to quash the subpoena duces tecum, however unless the Government has some strong reason, that is, that would affect the security of the United States, why, the Court will have the documents marked and will seal them.

Mr. Pfeiffer: All right, sir.

The Court: You may have the reporter mark them and then we will seal them so they can go up to the Circuit Court with the record, if that is what counsel wishes.

Mr. Covington: Your Honor, that is not what I wish. I don't ask that the documents be sealed. I ask that they be marked as exhibits and treated like any other exhibits that go to the appellate court.

The Court: Your motion is denied because I have quashed that, so that takes care of that; but, I am still willing to seal them if you think there is something in there that would affect the ruling of the Court.

By Mr. Covington:

Q. Mr. Evensen—and this is pursued to complete our bill of exception—those longhand notes that you made, were they made by you at the time of the hearing there in the courtroom when this man was present before you?

A. Yes, sir.

Q. They were made concurrently with the hearing, is that it?

A. That's right.

Q. And simultaneously?

A. That's right.

Q. Were those longhand notes used by you in preparing the typewritten report?

A. Yes, sir.

[fol. 59] Q. And was the typewritten report based upon the longhand notes?

A. Yes, sir.

Q. Together with your memory or recollection of events that transpired?

A. Yes, sir.

Q. How many pages are there in your longhand notes?

A. Two and a half pages.

Q. How many pages are there in your typewritten report to the Department of Justice?

A. Five pages.

Q. It is single-spaced, is it?

A. No, it is double-spaced.

Q. Now, what documents did you use in making that typewritten report to the Department of Justice?

A. I used the form given me by the Department of Justice for making up a report, and my longhand notes.

Q. Did you use any of the draft board file or any of the papers that had been forwarded to you by the Department of Justice?

A. No.

Q. You used none of that, is that correct?

A. That's correct.

Q. Did you use the resume of the FBI report that you sent to the Defendant?

A. I believe that I did, to the extent that my longhand notes reflect that I questioned Mr. Gonzales about a charge of law violation that was in there.

Q. In the FBI summary?

A. Yes, in the resume, and also in the typewritten copy.

Q. Did you have in your hands and consider documents that had been forwarded to you by the Department of Justice, such as the original FBI reports or a carbon copy of the original FBI report? Did you use that? Did you have it in your possession?

A. I had it in my possession.

Q. Had you read it before?

A. I had read it before.

Q. And you had knowledge of the contents of that FBI report copy which is different from the resume?

Mr. Pfeiffer: Just a moment.

Q. —at the time you made the report?

Mr. Pfeiffer: Just one moment; I will object to the question. It is a double question, as to whether or not it was different or not has not been established.

Mr. Covington: I will withdraw the question and ask this:

[fol. 60] Q. Did you have the FBI report, a copy of the FBI report, not referring, of course, to the resume? You know there is a difference, isn't there?

A. Yes.

Q. The resume is a matter that is mailed to the Defendant that mentions no names and is considerably shorter than the report, isn't it?

A. That's correct.

Q. And the original FBI report does contain names and is more extensive than the resume, isn't it?

A. Yes, that's right.

Q. And the resume means summary, and that, of course, means what it says. It is not a full report, but it is a resume or summary of the report, isn't it?

A. Yes.

Q. Now then, you had a copy or the original of the FBI report or reports at the time you had this man's case before you, didn't you?

A. Yes, that's right.

Q. And you had read those, did you not?

A. Yes, sir.

Q. Did you send those original reports along with your report to the Department of Justice, your report of the hearing?

A. Yes, I did.

Q. You return those back to Washington?

A. That's right.

Q. Had you read these original or carbon copies of the original FBI report before you held this hearing?

A. Yes.

Q. Did you have knowledge of their contents?

A. Yes, sir.

Q. Did you consider the contents of the original reports when you made up your report to the Department of Justice of the hearing?

Mr. Pfeiffer: Just one moment. I think we will object to this, Your Honor, in that it is going into indirectly what the Court has ruled that he could not do directly.

Mr. Covington: The Court has not ruled on the FBI report, Your Honor.

Mr. Pfeiffer: The preparation of his report to the Department of Justice.

Mr. Covington: I am laying the groundwork for calling another witness, Your Honor, about the FBI reports.

The Court: The objection will be sustained on the ground that the words "did you consider" are too broad.

Mr. Covington: I will rephrase the question then, may it please Your Honor.

[fol. 61] Q. Did you use the knowledge that you had acquired from a reading of the FBI reports or a copy of the FBI reports in making your report of the hearing to the Department of Justice?

A. I will say this, that knowledge in the conduct of the hearing—and that is reflected in my notes—but, using it separate from what my notes reflect, I would say no.

Q. Now, this report that you made to the Department of Justice is a report that is required by law, isn't it?

A. Yes, sir.

Q. And the longhand notes that you made, while not required by law, were considered by you to be necessary in order to discharge your responsibility of making a full and fair report of the hearing, was it not so?

A. That's correct.

Mr. Covington: In view of the evidence that has been developed here, Your Honor, in view of the connection between the longhand notes and the hearing officer's report, I again ask the Court to reconsider the ruling and allow these documents to be in evidence. In this connection I would like to ask Mr. Evensen another question:

Q. You actually have before you at this time, do you not, the longhand notes as well as the typewritten report?

A. Yes, I do.

Mr. Covington: We ask now that the Court set aside the rulings that have been heretofore made and allow these documents to go into evidence in view of the development now that this has been shown to be the longhand notes as well as the typewritten report to be a chain in the link of machinery that is conducted in the Department of Justice on the hearing of this man's claim.

The Court: The previous rulings in connection with this matter will stand.

Mr. Covington: Yes, Your Honor.

Q. You have no recollection independent of the notes, is that correct, and the reading of the typewritten report?

A. That's right. It has been a year and about seven months, and I don't recall.

Mr. Covington: Now then, may it please the Court, in view of the fact that the longhand notes have been used by [fol. 62] the witness to refresh his recollection, the Court is called upon for this reason, which reason has not heretofore been stated to the Court, that the Court permitting the longhand notes to go into evidence—

The Court: The previous—

Mr. Covington: I would like to have an opportunity also to look at those longhand notes, since they have been used by him to refresh his memory. He is an adverse witness, and under the rules I may desire to question—

The Court: Where is there anything in the rules of criminal procedure for an adverse witness?

Mr. Covington: Your Honor, it is evident, the man is an employee of the Government, and the Government made an adverse recommendation in this case. The Department of Justice, the administrative agency made an adverse ruling, and be that as it ~~may, I~~ feel that in view of the fact that he has had to use these notes to refresh his recollection, under the rules of evidence when a witness has resorted to such matters counsel has the opportunity, as I understand it, to look at the notes.

The Court: You don't need to get up. I ruled on that this morning and now counsel is seeking to go around my ruling. My ruling was very specific at the time when I quashed the subpoena duces tecum with reference to the notes and order, and I provided that he may use them to refresh his memory, but for that purpose and that purpose alone, and I assured the United States Attorney that I would not permit this to be a means of getting the things in the back door. I made my position clear, and my position will be maintained at this time.

Mr. Pfeiffer: Yes, sir. We would also like to state that it is his witness, and I don't think that it has been shown that he is adverse.

The Court: Anything further of this witness?

Mr. Covington: Just a minute.

By Mr. Covington:

Q. Who appointed you to this position that you occupy, Mr. Evensen?

A. Attorney General Brownell.

Q. Are there certain instructions that you receive as to the proper conduct of your office?

A. Yes.

[fol. 63] Q. Who do you get those from?

A. From the Department of Justice in Washington.

Q. What do those instructions consist of, without going into the details?

Mr. Pfeiffer: Object to this; I don't see the relevancy of this at all.

Mr. Covington: The purpose of this, Your Honor is to show the connection, to show that this man and his action in this case is an essential link in the chain, or a cog in the machinery of the Department of Justice that was set in motion that resulted in the adverse recommendation to the Department of Justice.

The Court: I think the Government would concede that this man is one of the channels through which the matter, one of the shall we say officers through which such matters are channeled, wouldn't you, Mr. Pfeiffer?

Mr. Pfeiffer: That's correct; it is a matter that is set up pursuant to statute and regulation. It is a channel.

The Court: You will concede that this man was acting in that capacity and under appointment by the Government?

Mr. Pfeiffer: That's correct.

The Court: All right, the objection will be sustained.
Mr. Covington: That's all.

Cross examination.

By Mr. Pfeiffer:

Q. Mr. Evensen, at the time of the hearing did Mr. Gonzales request or demand of you to see the FBI reports?
A. No, he did not.
Q. Was there any objection made by him to you as to the resume of the FBI?
A. No.
Q. He made no objections to the resume at all?
A. That's right, he made no objections.

Mr. Pfeiffer: No further questions.
Mr. Covington: That's all.
[fol. 64] The Court: You are excused, Mr. Evensen.

(Witness excused.)

Mr. Covington: Mr. Mazzulla.
Mr. Pfeiffer: Mr. Evensen would like to be excused.
The Court: Will you want him any further?
Mr. Covington: No.
The Court: Will you?
Mr. Pfeiffer: No, Your Honor.
The Court: All right, you are excused then.

Fred M. Mazzulla, a witness called on behalf of the Defendant, testified:

Mr. Covington: Your Honor, Mr. Erickson has just informed me that Mr. Evensen has taken away the two documents that you had ordered sealed, and I don't know whether that order stood or is applicable or not.
Mr. Pfeiffer: I don't think the Court entered such an order.
The Court: No, I said I would. It is my understanding that the Defendant stated that he did not want it that way.
Mr. Covington: Your Honor, in order that the record might be clear, I wanted the documents in the record, but

I didn't want them in sealed with the qualification that the Court made.

The Court: Has Mr. Evensen left?

Mr. Pfeiffer: If I understand counsel correctly, he wishes to have it marked, offer them into evidence, and we would object to them.

Mr. Covington: I didn't say that I would object to it.

[fol. 65] Mr. Pfeiffer: I would object to it, but there is no request for an in camera inspection, is that correct?

Mr. Covington: That's right, I didn't do that, because I just want the record to show that we offered the two documents into evidence without being sealed, so that we might complete our bill of exception in the appellate court, that's all.

The Court: I quashed the subpoena duces tecum. So far as the Court is concerned, that takes care of the matter, unless counsel will affirmatively request that they want those two documents preserved for the Circuit Court of Appeals or some higher court, in which event the Court is willing to order that the two documents be marked by the reporter, sealed and kept in the vault of the clerk's office and sent up with the record to be disposed of as the higher court may determine.

Mr. Covington: I request, Your Honor, that they be marked and made exhibits, but unfortunately I cannot accede to the order of the Court sealing the documents, because I can't deal with a matter that I can't see, and in the Jencks case it was held that if a document is to go into the record it is not to be done in camera inspection. That's the way I understood it, and because of what was said in the Jencks case I am unable to accede to that qualification of sealing them; but I still make my request and I don't waive it, that the documents be marked and made a part of the exhibits for the appellate court.

The Court: All right, the Court's ruling will stand. The subpoena was quashed. I was just going to suggest that Mr. Evensen be sure that he preserved the two documents in case of a retrial or something of that sort.

Direct examination.

By Mr. Erickson:

Q. Mr. Mazzulla, what is your occupation?

A. I am a—

The Court: Pardon me, I don't believe we have his name in the record.

Q. Excuse me; would you state your name, please?

A. My name is Fred M. Mazzulla.

Q. What is your occupation?

A. I am an attorney at law licensed to practice in Colorado.

[fol. 66] Q. How long have you been so engaged?

A. Since 1937.

Q. Where are your offices located, Mr. Mazzulla?

A. 514 Symes Building.

Q. Are you also connected with the Department of Justice in some manner or another?

A. I was first appointed by the Attorney General of the United States to the office of special assistant to the Attorney General, and a couple of three years later I got communication that the title was changed to hearing officer, Department of Justice, and since that appointment about five or six years ago I functioned in one capacity or the other.

Q. I see, and as a hearing officer what do you do?

A. My duties are to hold hearings in connection with claims of conscientious objectors, take evidence, reduce my recommendation to writing, and submit it to the Department of Justice.

Q. And you do this pursuant to the directions of the Department of Justice?

A. Yes.

Q. Where do you conduct these hearings, Mr. Mazzulla?

A. All the hearings that I have held, Mr. Erickson, have been in my office in the Symes Building.

Q. What is your office number?

A. 514.

Q. In conducting these hearings do you make any record of what transpires?

A. Sometimes. I always makes notes; I don't make extensive records unless it is a complicated case. I have heard I presume maybe fifteen or twenty cases, and when this case came to my attention I had completely forgotten about it. I had to go to my files to get the file.

Q. So your recollection regarding this case comes from reading notes you prepared in connection with the case at the time of the hearing?

A. I am afraid I have got to say that that is entirely true, Mr. Erickson.

Q. Thank you, is there a court reporter present at the time the hearing is conducted?

A. No, there isn't. In fact, I believe our instructions are that they are to be conducted in a rather informal manner. I am relying on my memory for that, but I believe I remember those words.

Q. How did this case come to your attention, through what office?

A. Again referring to my file, Mr. Erickson, I received a communication from Charles S. Vigil, United States Attorney. I have his original letter here; if you care I will read it.

Q. That would be fine.

A. That might give you the answer you want. It is dated October the 12th 1953.

Mr. Pfeiffer: Just one moment. In view of his reading this I want it to be known that we are not waiving any [fol. 67] objections we have to other matters that he may be going into, other documents that he may have. I think that will clarify the procedure.

A. Am I to continue reading the letter now?

Mr. Pfeiffer: Yes, sir.

A. It is addressed to Fred M. Mazzulla; it is on the United States Department of Justice stationery, United States Attorney, * * * . [The exhibit, Defendant's Exhibit D, appears at side folio 120, printed page 124.]

* * * and that was the communication that I received requesting that I hold this hearing, Mr. Erickson.

Q. Now, in connection with that letter were the reports that you have referred to in the letter enclosed with it?

A. Again not relying on my memory but relying on my notes I notice I have numbered these from one to five on the left side and have made check marks on the right side, so I would say—and again I say not from memory, but from my notes—those were enclosed in the file, yes.

Q. What did you do with those reports from the Federal Bureau of Investigation?

A. I probably read them, Mr Erickson.

Q. And after you had finished reading them what did you do with them?

A. I just put them back in the file.

Q. Do you still have them in your possession?

A. Oh, no; they remained with the file that was sent to me by Mr. Vigil.

Q. And when you sent the file on to the Department of Justice you sent the reports along with the file, is that your testimony?

A. Let me answer it this way, Mr. Erickson: I sent back everything that was sent to me.

Q. Now, you sent that to whom?

A. Let's see my letter of transmittal here. I sent that to the Conscientious Objector Section, Department of Justice, Washington 25, D. C.

Q. Did you in your letter of transmittal refer to the documents that you were sending back?

A. No, I did not. Here is the letter that I sent on November the 4th 1953.

Mr. Pfeiffer: Just one moment, Your Honor. I think we will object to it.

The Court: He has answered the question, so your objection is sustained. He said he did not.

[fol. 68] The Witness: What was the question? Did I answer it?

The Court: Read the question again.

(Last question and answer read by the reporter.)

Q. Did that letter contain your recommendation to the Department of Justice?

A. I don't know just how to answer that. I transmitted the entire file and record together with two copies of the findings of fact and recommendations.

Q. So the findings of fact and recommendations are in the hands of the Department of Justice and not in your hands at the present time?

A. I have copies in my hands.

Q. Do you have the copies with you at this time?

A. Yes, I have a subpoena duces tecum to bring the entire file, and I brought everything that I have.

Q. What did you bring pursuant to that subpoena duces tecum?

A. First you asked me to—the subpoena duces tecum commands me to bring my notes on the hearing conducted by me on the 4th of November, '53.

Q. Did you bring those?

A. Yes, these are my notes here on this yellow piece of paper.

Q. I see.

A. Next I am commanded to bring, number two, stenographer's transcript of questions and answers of the registrant, Raymond Gonzales. There was no stenographer's transcript. In my practice I ask the registrant questions and do not have a stenographer's transcript, so not having any I didn't bring any.

Three, copy of the resume or summary of the Federal Bureau of Investigation report mailed to the Defendant Raymond Gonzales. I might explain that two copies are received by me, were received by me from Mr. Vigil's office. I transmitted one copy to Raymond Gonzales, Jr., and the other copy went back with the file to the Department of Justice, so not having a copy I can't produce one.

Q. Do you know when that copy of the resume was given to Mr. Gonzales?

A. It was sometime between November the 4th—date of giving notice of hearing—it would be October the 20th 1953 or within one or two days subsequent. That was the day that I posted it, Mr. Erickson. It would be shortly after October 20th 1953. Now, may I continue?

Q. I hope you will.

A. I think I answered number three, but I do not have a copy. Number four, copy of the report of the hearing conducted by me and mailed to the Attorney General in [fol. 69] Washington, D. C. on the conscientious objections of Raymond Gonzales, the Defendant, whose Selective Service Number is 593458, and which hearing officer's report was used by the Department of Justice in making recommendations to the Appeal Board against the conscientious objection claim of the Defendant. I do have with me one and perhaps two copies of the report that I made pursuant to the hearing that I conducted, Mr. Erickson. I have those with me.

Five, all correspondence relating to the Defendant Raymond Gonzales, all reports made by me on or concerning the Defendant, Raymond Gonzales, regarding this classification for military service. I have the entire file here; I do not have copies of any letters that I might have sent to Mr. Gonzales.

Q. What does that trial that you have referred to include?

A. You mean all of my file?

Q. Yes.

A. My file includes—the bottom of the file, the copy of my findings and recommendations. On top of that is the letter of transmittal to the conscientious objector section. On top of that is a letter that I read that Mr. Vigil sent to me transmitting the file to me. Next I have a carbon copy of my letter to Mr. Vigil dated November the 5th 1953, and on top of that is the conscientious objector docket, and on top of that is the letter from the Department of Justice dated February 1, '54, directed to me and signed by T. Oscar Smith.

Q. Now, at the time of the hearing that you conducted did you allow the Defendant, Raymond Gonzales, to examine the reports that you referred to from the Department of Justice?

A. If I was to testify here on oath, Mr. Erickson, that I distinctly remember what occurred, I would have to say I don't know, because I have no independent recollection. My practice has been, Mr. Erickson, this: In all conscientious objector hearings, I believe, with the Selective Service since the beginning, and I recall that one of the rules or regulations or laws of Selective Service was that the cover sheet in connection with the registrant, that is, all papers contained in the cover sheet could be examined only by the registrant or his designated agent or personnel of Selective Service, and I believe the Department of Justice, and having in mind that the registrant can at all times examine his cover sheet I never denied any registrant the right to the privilege to examine anything that was in the cover sheet, and had this man asked me I am sure he would have seen everything that was in there. Whether he asked me or not I don't know.

Q. And these FBI reports you placed in the cover sheet, is that correct?

A. I have no independent recollection of that, Mr. Erick- [fol. 70] son. Whether I placed them in or on top I have no independent recollection; it could have been either place; it could have been both.

Q. Well, they were part of the Selective Service file then?

A. They were transmitted to me and I returned them, Mr. Erickson.

Q. As part of his Selective Service file, isn't that correct?

A. Yes.

Mr. Erickson: Thank you very much.

Cross examination.

By Mr. Pfeiffer:

Q. Mr. Mazzulla, are you stating that in your opinion the FBI reports were a part of the Selective Service file?

A. I am merely stating that I have independent recollection. I have a letter from Mr. Vigil that I read stating that the reports were transmitted to me. Something was transmitted to me, because I numbered them from one to five, and I sent them back to the Department of Justice.

Q. But you are not stating that the FBI reports were a part of the Selective Service file?

A. No, they were sent to me along with the file. Now, whether they were on top or inside or under I have no independent recollection, I am sorry.

Q. So then if Mr. Gonzales had asked you to look at the FBI report you would have let him see them, is that correct?

A. I stated that any registrant who would ever ask me to see anything in his file would be permitted to see it.

Q. So if the registrant had asked you to see the FBI reports you would have let him see it?

A. Yes.

Mr. Pfeiffer: I have nothing further. You may examine.

Redirect examination.

By Mr. Erickson:

Q. May I see the reports that you are referring to?

Mr. Pfeiffer: Just one moment, please, Mr. Mazzulla. We will move to quash the subpoena duces tecum at this time on the grounds previously stated with regard to Mr. Evensen.

The Court: All right, do you care to state any grounds other than those you stated in connection with the other witness, Mr. Erickson?

[fol. 71] Mr. Erickson: No, Your Honor.

Mr. Pfeiffer: I would like to add one more ground, Your Honor, on the ground further that the Defendant has had a subsequent appeal from this matter and had a review de novo of the whole case, and therefore these are not relevant to the question at this time.

The Court: The motion to quash then as to the notes made by the witness at the hearing and as to the report of the hearing, that is, a copy of the report, the motion to quash the subpoena duces tecum as it applies to those two documents is granted.

By Mr. Erickson:

Q. What documents do you have in your possession or control that were not enumerated by the Court, Mr. Mazzulla?

A. I think the Court said they quashed my notes that I made at the time, and the report that I made to the Department of Justice. In addition to that, Mr. Erickson, I have a letter from the Department of Justice dated February 1, 1954, addressed to me and signed by T. Oscar Smith.

Q. May I see that letter?

A. I think it is this letter, Mr. Erickson (indicating).

Mr. Erickson: Do you have a motion?

Mr. Pfeiffer: Yes. We have no objection.

A. In addition I have a white piece of paper here, three-hole punched.

Mr. Erickson: Let the United States Attorney see it first.

The Witness: That is the conscientious objector docket in case No. 35005.

Mr. Erickson: Any objection?

Mr. Pfeiffer: No.

The Witness: Now, in addition, Mr. Erickson, I have a carbon copy of a letter dated November 5, 1953 addressed to Charles S. Vigil, United States Attorney, in connection with this matter, signed by me. It is the letter of trans- [fol. 72] mittal—no, it is a letter that—well, it is the carbon copy of the letter that I sent to Mr. Vigil.

In addition I have the original on the stationery of the United States Department of Justice, dated October 12, 1953, addressed to me and signed by Charles S. Vigil, that being the letter that I read a few minutes ago.

Mr. Pfeiffer: I see no purpose of marking that; it has already been read into the record.

(Defendant's Exhibits A through D, inclusive, were marked for identification.)

The Witness: In addition, Mr. Erickson, I have a carbon copy of a letter bearing the date November 4, 1953 addressed to Conscientious Objector Section, Department of Justice, Washington 25, D. C., and signed by me.

Mr. Pfeiffer: We will object to this, Your Honor. It is the cover sheet sending the files back, the report back.

The Court: Perhaps he wants it marked.

(Defendant's Exhibit E was marked for identification.)

Q. In addition to Defendant's Exhibits A through E what other papers do you have in your file?

A. The only papers are carbon copies of my report of hearing with recommendations and the notes that I made on this yellow piece of paper. Those are the only two items that remain in my file other than the copy of the subpoena duces tecum.

Q. And your entire recollection relating to the case of Raymond Gonzales, Jr., is reflected in your file, your notes, or your report on the hearing conducted by you?

A. Yes, I have no independent recollection of it; I would have to get it from the file.

Mr. Erickson: We again request the Court for a ruling that we be given an opportunity to examine the notes and the report made by the hearing officer based upon the fact that the hearing officer has based his entire testimony upon the records that he has referred to and not on his independent recollection, and that they are necessary to establish [fol. 73] what occurred, and as to whether or not this defendant was given the procedural safeguards provided by the Selective Service Act and the Constitution.

We also renew our request based upon the reason set forth by Mr. Covington.

The Court: The request will be denied.

Mr. Erickson: I move the admission of Defendant's Exhibits A through E.

Mr. Pfeiffer: I will object to them; I fail to see what they will add or detract from the issues of this case whatsoever, Your Honor. It has been testified to that the report was mailed to Mr. Mazzulla from the Department of Justice. He held a hearing and he mailed it back. I don't see what they add or detract from.

The Court: Let me see Exhibit E.

Mr. Erickson: I believe the Court would want to examine Exhibit C.

The Court: The objections to each of the exhibits, Defendant's A through E, inclusive, are sustained as being irrelevant.

Mr. Erickson: No further questions.

Mr. Pfeiffer: May this witness be excused?

Mr. Erickson: We have no objection, Your Honor.

The Court: All right, you are excused, Mr. Mazzulla. Will you want these back?

The Witness: I would keep them with my file, Your Honor, if they were returned to me. I presume they should be returned to me ultimately.

The Court: They will be returned ultimately. We will need photostatic copies of them. I guess they can substitute copies and return these.

Mr. Erickson: We have no objection on that, Your Honor.

[fol. 74] **The Witness:** And my notes and my findings I am to take with me?

The Court: Yes, but preserve them, if you will, please, sir.

(Witness excused.)

Mr. Covington: We will call to the stand Mr. Werner, may it please the Court.

Scott J. Werner, a witness called on behalf of the Defendant, testified:

Direct examination.

By Mr. Covington:

Q. Mr. Werner, will you give the Court your full name, please.

A. My name is Scott J. Werner.

Q. Where do you live?

A. I live in Wheat Ridge, Colorado.

Q. What official position, if any, do you occupy with the United States Government?

A. I am special agent in charge of the Federal Bureau of Investigation.

Q. Denver office?

A. Denver office, right.

Q. And you had served upon you a subpoena duces tecum, did you not, or your office had served upon it a subpoena duces tecum?

A. I had it served upon me personally.

Q. Do you have a copy of that?

A. I didn't bring it with me; the United States Attorney had it.

Q. Mr. Werner, using the copy of the subpoena duces tecum which has been handed to you by the Assistant United States Attorney to refresh your memory, state what documents you have been commanded to produce pursuant to that subpoena?

A. All of the reports of the Federal Bureau of Investigation in connection with the classification of Raymond Gonzales for military service, and complete secret investigative report made by the agent or agents of the Federal Bureau of Investigation, including all written statements taken from witnesses in connection with the investigation and used by Fred M. Mazzulla and Maurice E. Evensen, hearing officers of the Department of Justice, in conducting the hearings and making their report on the conscientious objections of Raymond Gonzales, the Defendant.

Q. Now, pursuant to that subpoena have you produced such documents?

[fol. 75] Mr. Pfeiffer: May it please the Court—

Q. I will ask this: Have you brought such documents with you to the courthouse?

A. I have not, no.

Q. May I ask it before you make an objection? Are they in your custody or in the custody of the United States Government here in the office of either the Department of Justice in Denver—

A. They are, yes.

Q. How many such reports are there?

A. I do not know the number of reports.

Q. There are more than one, of course, are there not?

A. I believe there are more than one, yes, sir.

Mr. Covington: We ask, may it please the Court, that the Federal Bureau of Investigation, secret investigative reports made pursuant to the act and regulations and used by the hearing officer under the act and regulations that are called for in the subpoena, be produced by the United States and by the witness in this case.

Motion to Quash Subpoena and Ruling Thereon

Mr. Pfeiffer: If it please the Court, at this time we urge our motion to quash the subpoena that was served upon Mr. Werner, and also the one that was served upon Mr. Boyle. We cite the case of Bouziden vs. United States in support of that at this time.

The Court: Do you have anything further, Mr. Covington?

Mr. Covington: Yes, Your Honor. I would like to state for the record in answer to the motion to quash there has been urged here orally that the purpose of subpoenaing these documents and the reason why we ask that the witness produce them is so that they might be received into evidence for the limited purpose of establishing that the resume of the FBI inquiry that was sent to the Defendant and which was also mailed to the Appeal Board did not contain all of the favorable evidence that appears in the file supporting the good faith bona fideness of the Defendant in the making of his conscientious objector claim, and that they would establish or we would want to use them for the purpose of establishing that the Department of Justice withheld from the Appeal Board favorable facts that were in the file, I mean in the FBI reports, that do not appear in the resume or summary of these documents that would have exculpated the Defendant from the adverse recommendation made by the Department of Justice; and until we see these documents called for there cannot be a determination of this question.

[fol. 76] I might add that at the close of the evidence in this case we, if permitted to produce these documents, would make a motion to the Court contending, among other things, that there was favorable evidence in these documents that would have established that the Defendant was entitled to the 1-0 classification, the conscientious objector classification, and the withholding of that favorable evidence not appearing in the resume constitutes a denial of procedural due process contrary to the Fifth Amendment, and to the fair and just provisions of the Act, and it is for that purpose that we call for these documents.

We cannot say until the documents have been seen whether the resume is fair and just as contemplated by the Act.

Mr. Pfeiffer: We urge our same objection, and from the last statement made by counsel it appears that he is on a fishing expedition, and we urge the same grounds heretofore urged, Your Honor.

The Court: The motion to quash the subpoena duces tecum served on the witness Werner is granted.

Mr. Covington: May it please the Court, at this time we ask the Court to reconsider the ruling on the grounds that it is obvious that the only way that this question that we are urging to the Court, and the only way that this defense that is permissible under the law can be established that there was a denial of procedural due process of law, is by comparison of the original FBI reports with the resume, and inasmuch as the Court has entered an order quashing it for the reasons stated and also because if the order is allowed to stand the Defendant will be denied his right to make his defense, we say to the Court and would like to have the record show that the Defendant excepts to that ruling on the grounds that it denies him his procedural rights in the District Court to make his defense, contrary to the due process provisions of the Fifth Amendment to the United States Constitution, and for this reason stated in the exception we ask the Court to reconsider the ruling now and allow the subpoena to stand.

The Court: The Court will maintain its previous ruling and the subpoena is quashed.

Mr. Covington: That's all, Your Honor.

Mr. Pfeiffer: May this witness be excused?

[fol. 77] Mr. Covington: Yes, as far as we are concerned.

The Court: Yes, you are excused.

Mr. Covington: Your Honor, let the record show that we also subpoenaed the United States Attorney to produce the same documents, and served the same type of subpoena upon Mr. Werner, and inasmuch as our questions propounded to Mr. Werner would be the same as to the United States Attorney, we see no need to repeat that performance. I mean, our exception is good for the record with the one witness.

The Court: All right, then you are excused, Mr. Boyle.

Mr. Covington: Thank you, sir.

Raymond Gonzales, Jr., the Defendant herein, testified:

Direct examination.

By Mr. Covington:

Q. State your full name.
A. Raymond Gonzales, Jr.
Q. Where do you live?
A. 619 South Cascade, Colorado Springs, Colorado.
Q. How old are you?
A. Twenty-four.
Q. Are you married?
A. Yes.
Q. When did you get married?
A. July the 7th 1956.
Q. Do you have any children?
A. Yes.
Q. How many?
A. One.
Q. Now, you are the Defendant in this case, are you not?
A. Yes.
Q. And you registered with the Selective Service system, did you not?
A. Yes.
Q. And did you file a conscientious objector, or rather a classification questionnaire, is that correct?
A. True.
Q. And following your filing of the questionnaire you also filed a conscientious objector form, is that not right?
A. Yes.

Q. And you had a hearing, did you not, in the Local Board at some time?

A. That's true.

Q. Both in the year 1953, August 13th, and also on August the 17th 1956. You had two personal appearances, is that right?

A. Yes.

Q. Well now, concerning the last personal appearance [fol. 78] could you tell us whether or not there was any evidence that you desired to offer to the Local Board at the personal appearance that you were denied the right to offer?

Mr. Pfeiffer: Just one moment, Your Honor. We will object because the question is leading. He should state what happened.

The Court: The objection is overruled; you may answer.

A. Yes, it was.

Q. All right; now, tell the Court how that came about, what happened?

A. Tell the entire—

Q. Yes, what happened in reference to your not being able to offer evidence that you had in mind giving to the Board when you went there?

A. Well, the minute that I opened my Bible to start speaking concerning my ordination and ministerial duties one of the board members said to me, "We have heard all that before, and besides we have our minds made up in this case. If there is anything you would like to do we will have to refer you to the Appeal Board."

Q. How long did the hearing last?

A. Not over four minutes.

Q. Now you also had a hearing before Mr. Evensen and the Department of Justice, did you not?

A. That's true.

Q. Now, would you tell us what took place upon the occasion of that hearing?

A. On January the 7th 1957, Mr. Nelson and Mr. Fisher and myself drove from or I drove from Colorado Springs —we were in my car—to Pueblo, and we parked across the street from the Post Office Building and went into the courtroom, which was designated as the place where we were to meet Mr. Evensen; and at 10:00 o'clock we met Mr. Evensen at the courtroom, and he said, "You are Mr. Gonzales, aren't you?" I said, "Yes." Then I introduced to him the other two persons that were with me, Mr. Fisher and Mr. Nelson, and as we went inside of the courtroom Mr. Evensen told me to sit at the table with him.

We both sat at the table, and he told the other two to sit in the front row of the chairs there, which was just a short distance between us, and the first thing after being introduced he asked me concerning the work situation, and we did mention—I mentioned that it was slack at that time, that it wasn't the wintertime, and then he proceeded to ask me if my two friends were Jehovah's Witnesses, and I said, "Yes." Also he asked me if my wife was one of [fol. 79] Jehovah's Witnesses, and I said, "Yes." He asked concerning my parents, if they were both Jehovah's Witnesses, and I said, "Yes."

I said, "As a matter of fact I was raised by them in the faith of Jehovah's Witnesses."

Mr. Pfeiffer: If it please the Court, I fail to see the relevancy of this; we will object to it on that ground.

Mr. Covington: Your Honor, the offer of this evidence is that the sum and substance of what he tells here is offered for the purpose of showing that he gave favorable evidence at the hearing that ultimately was not transmitted to the Appeal Board by the Department of Justice, and therefore there has been a denial of procedural due process of law, and that is the purpose, and it cannot be developed in one question and one answer.

The Court: I think the Defendant should be permitted to tell his side of the story, so I think I will overrule the objection. You may go ahead, Mr. Gonzales.

By Mr. Covington:

Q. Now, you go ahead, Mr. Gonzales.

A. I stated, "Now, concerning my parents," that they were both Jehovah's Witnesses and I was raised as one of Jehovah's Witnesses; and then Mr. Evensen asked me if I smoked, and I said no. He also asked me concerning the matter of drinking, and I said that I did not drink except for an occasional can of beer once in awhile, and he asked me if I would at any time use force and to what extent I would use force, and I said the only time that I would use force to the extent of killing would be to protect myself or my family from immediate danger; however, if it would be possible for me to leave if somebody attacked me I would just as soon do that. Something else that Mr. Evensen asked me was if I would take part in non-combatant duty, and I told him that I would not take part in combatant or non-combatant duty because I felt that that would be compromising, and I would not compromise in any respect.

One other point he asked me was, "Did Jehovah's Witnesses as a church or an organization take a stand or tell an individual what to do concerning the military issue." I said, "No, that was left up to the individual to decide." I told him that the decision that I had made was due to my knowledge and understanding and study of the Bible. [fol. 80] So he asked me if I thought I should have a conscientious objector claim and I said yes. Then he called the next witness and he did tell me that if I had anything to say after he had talked to the other two that I could say so. So he called Mr. Phillip Fisher. He asked him how long he had known me and his address. Mr. Fisher stated that he lived at 932 East Rio Grande, had known me for approximately two and a half years, and Mr. Evensen asked him if he thought that I was sincere in my conscientious objector claim, and he said that he thought that I was and,—

Mr. Pfeiffer: If it please the Court, this is strictly hearsay; I don't see why it would be admissible.

Mr. Covington: I don't quite understand the objection. I would like to reply to the comment that it is hearsay, Your Honor. The statement made by the Department of Justice, a representative of the United States Government, and he is not telling what somebody else said outside the hearing, but what was said by the witnesses at the hearing, and it all goes to the favorable evidence that was offered there in his behalf which the Department of Justice, we submit, did not forward on to the Appeal Board.

The Court: All right, the objection will be overruled. You may proceed, Mr. Gonzales.

The Witness: When he asked Mr. Fisher if he thought I was sincere he said, "Yes," and he asked him why, and he said because he had known me and was well acquainted with me. Then he asked him how well was he acquainted with me, and he said quite well, because we associated quite frequently, and Mr. Evensen asked Mr. Fisher if I attended all the meetings of Jehovah's Witnesses at our church, Kingdom Hall, and Mr. Fisher stated that I did, and he said, "For that matter I know, because we are both assigned as ushers or attendants at the Kingdom Hall, wherein we help the people to get seated and take the count of the ones present," and I believe that's all he asked Mr. Fisher.

He called Mr. Nelson next, and he asked Mr. Nelson what his occupation was, and he stated that he was a full-time minister. He asked him how long he had known me. He said approximately three months, and then Mr. Evensen said, "Do you believe that he is sincere in his conscientious objector claim?" and Mr. Nelson said, "Yes." Then Mr. Evensen asked him, "How would you be in a position to [fol. 81] state that he is sincere when you have only known him for three months?" Mr. Nelson said that he had been a full-time missionary from the foreign fields as well as in this country, and he had met many people of our religion and associated with them, and in knowing people of this religion he was in a position to know because of his experience.

So at this time Mr. Nelson handed Mr. Evensen a small pamphlet. I don't recall the name of it now, but it was a piece of literature that Mr. Nelson told him that it explained our views and our conscientious objections. He told him that he would like to have him read it. Mr. Evensen said he would. At this time he dismissed Mr. Nelson, and I then told Mr. Evensen that I did have something I would like to discuss with him, and that was the matter of a part of the resume of the FBI report, and that was concerning the incident that is in the Colorado Springs Police Department, in their files, wherein it is mentioned, or rather I explained exactly how it happened to him.

I told him that, I don't recall the date—it was on a Friday night. I had been at the Kingdom Hall at our meeting, and after the meeting I proceeded to take my girl friend—now my wife—home, and on leaving her at home I proceeded on my way to where I lived on the west side of town, and I lived on 26th Avenue, or Street, rather, and when I got to 26th I was in the right-hand lane, so I went up to the next corner and made a U-turn and came back to 26th—

Q. You are telling us now what you told Mr. Evensen?

A. Yes, sir.

Q. About this police report incident in the FBI resume?

A. Yes.

Q. All right, go ahead.

A. Then as I started to cross the bridge I told Mr. Evensen that a car approached me quite fast from the rear, and I didn't know who it was, and the bridge was quite narrow, so I just speeded my car up a little bit and got my car across the bridge, and then the police flashed on the red light and I pulled over and stopped. When I stopped the police officers got out of the car, and I also got out of my car, and I told Mr. Evensen that. Well, I did not notice exactly what was happening. I thought maybe I had been speeding or something, and I asked the officers what was taking place, and one of the officers looked at me and he said, "You know better than we do what is going on." [fol. 82] So then I again told the officers, assured them that I didn't know what was going on, that I would like to have it explained to me, and at this point I told Mr. Evensen that one of the officers got in the car and drove off, and the other one stayed there at my car with me. While the other officer was gone I asked the one there why they had stopped me, and he said something about me trying to pick up a woman over on 29th Street. Then I told Mr. Evensen that I denied, of course, trying to pick up a woman, because I had not even been in that vicinity. So shortly the other policeman came back in the car and they both went over to the police car and they talked for just a little bit, and then they came back to my car and said, "You will have to follow us to the police station." So I did get in my car and I followed them to the police station.

Q. Is that what you told Mr. Evensen?

A. Yes, I told Mr. Evensen that I followed them to the police station, and then upon arriving at the police station the officer in charge there told me to strip off my shirt and to raise up my pant legs, and he looked me all over, and then I proceeded to tell Mr. Evensen that I was fingerprinted and my picture was taken, and I did object to it because I told the officer I had never been in trouble with the law, and as I told Mr. Evensen what took place there, there was no charge filed against me; but, after that took place, after they took my picture and fingerprinted me then I was released.

The next day I came back and I obtained the names of the two officers that had picked me up the night before, and that is the explanation I told Mr. Evensen. I told him I wanted to clear up that part there with him concerning the resume, the part in the resume of the FBI report. Mr. Evensen told me that he had noticed that was in the report, but that he hadn't paid much attention to it because I was not arrested or any charges filed against me, so he believed it would have no bearing against me.

At this point Mr. Evensen stood up and he said, "I want you to know that the only thing I am here to do is to make a recommendation, and that's all." He said, "I have nothing to do with the classification that you will get or anything else." He said, "The only thing I can do is make a recommendation to the Department of Justice," and after he had been standing there and told us that we stood up. He came over and he shook hands with us and we left.

Q. Now, after that hearing you were mailed a copy of a letter from the Department of Justice in Washington to [fol. 83] the Chairman of the Appeal Board dated March 21st 1957, containing a recommendation to which was attached a resume of the FBI inquiry, is that correct?

A. That's true.

Q. From your Draft Board file I show you that letter, and I direct your attention to the first and second full paragraphs on the second page of that recommendation, and ask that you read them.

A. The first and second paragraph?

Q. First and second full paragraphs that begin on that page, not the paragraph carried over from the first page.

A. Do you want that read out loud?

Q. You might as well, yes.

A. "On August 17th 1956 when he personally appeared before his Local Board registrant stated that he was then devoting an average of 100 hours a month to actual preaching publicly and from house to house, and an additional fifty to seventy-five hours for preparation for ministerial duties, such as preparation for home Bible studies, calling back on good will persons, attending congregational meetings and training students to become ministers. He also indicated that he served as stock servant for his local congregation.

"The resume of the supplemental inquiry reflects the congregational servant of the group with which registrant is affiliated related that registrant spends from twenty to twenty-five hours each week in church activity or preparation for study groups. This person made available registrant's publisher's record which he described as registrant's record of activity and preaching to the public. This record reveals that for the period from September, 1954 through September, 1956 registrant devoted an average of approximately six and one-half hours per month to preaching to the public."

Q. Now, I call your attention to the last paragraph of that recommendation, on the third page, next to the last paragraph, read that.

A. "On the other hand the registrant's claim as to the amount of his religious activities is so highly exaggerated, if we are to believe the official records of his religious organization as reported in the resume and recapitulated above, as to cast doubt upon his veracity, and consequently, upon his sincerity and good faith. Therefore, with due regard for the hearing officer's recommendation, the Department of Justice finds that the registrant's claim is not sustained. Accordingly, it is recommended to your Board that registrant's claim be not sustained."

Q. Now, in reference to that statement there about the number of hours that you devoted to your work, did Mr.

[fol. 84] Evensen at the hearing bring that subject of those three paragraphs that you have read up to you at the hearing?

A. He did not.

Q. Was there any discussion at all? Were you given any opportunity to go into that matter and explain it?

A. No.

Q. Now, I show you your letter of April the 23rd 1957 that appears in the file, and I would like to have you read that to the Judge.

A. "Dear Sir; This is in answer to your letter of April 4, 1957, in which I also received a copy of the October 20, 1953 Supplemental inquiry. Enclosed was also a copy of the recommendation or information submitted by the hearing officer, on the appearance I made on the 7th of January 1957, at Pueblo, Colorado. At this time I would like to call your attention to the top of page 3 of the report dated March 21, 1957 signed T. Oscar Smith, wherein is found the statement in effect saying that I am opposed to both combatant and noncombatant service. In the following paragraph the statement is made that I am not opposed to noncombatant service, I would like to sustain the former. (I am opposed to both combatant and noncombatant duty.)"

Q. Now, just a minute. In connection with that did you at any time tell Mr. Evensen at the hearing that you were willing to do noncombatant military service?

A. No.

Q. What did you tell Mr. Evensen?

A. I told him that I would not participate in any part of the military because it would be helping, and I would be compromising.

Q. All right; now, go ahead.

A. "On page two, paragraph one I find the statement made that on August 17, 1956 I the registrant told the local board I was then devoting an average of 100 hours a month to preaching publicly. I would like to state that I did not at such a time make such a statement or any statement implicating the same. The only time I submitted such information was when I was pioneering that was in the period of October 1, 1952 to April 16, 1953. The statement is also found (He also indicated that he served as 'Stock Servant for his Local congregation.) On the 17 of August 1956 when I appeared before the Local Board at Boulder, Colorado, I was then associated with the South Unit of Jehovah's Witnesses at Colorado Springs, Colorado. I was not then serving as Stock Servant for the Local congregation. I did serve as Stock Servant for the Longmont, Colorado congregation; of which the record stands. I would like to make it plain that I in no manner ever exaggerated my report concerning my activities. The reason being more than just my respect for mere man, but as a Christian and Bible Student I realize I stand before the Higher Authorities Jehovah God and Jesus Christ, I am also fully aware of the consequences to liars as stated at [fol. 85] Proverbs 6:16, 17, 19 showing God hates a lying tongue. I also realize that for one to lie would make void his Christian conduct and worship. So please consider the information here submitted, I am sure the record stands behind it all."

Q. Now, if Mr. Evensen had brought that mattter of exaggeration up to you at the hearing, what if anything would you have told him so that it could have been forwarded to the Department of Justice in Washington?

Mr. Pfeiffer: Object to that as hypothetical.

The Court: Objection sustained.

Mr. Covington: Your Honor, we would like to make an offer of proof.

The Court: All right.

Mr. Covington: If the Defendant were allowed to answer this question he would show that had Mr. Evensen brought up this question with him he would have testified that he was not devoting 100 hours a month as reported by the Local Board, and that he never told the Local Board that; but, that at one time earlier in his life from October, 1952 to the spring of 1953 he was devoting 100 hours a month as a full-time minister, but he thereafter quit, and at the time of this hearing by the Local Board as well as at the time of the hearing of the hearing officer he was a part-time minister, and that he never exaggerated his claim. He merely showed that he was full-time at one time and part-time at another, and that he would have clarified the matter with the hearing officer so that the hearing officer would have made a true report of it to the Department of Justice and they would have had the true, full facts.

By Mr. Covington:

Q. Now, Mr. Gonzales, in the two paragraphs of the recommendation of the Department of Justice reference is made to a hearing that was conducted on the 17th of August, 1956, and in the Draft Board file there is a memoranda that seems to have been made by the Local Board, and I would like to have you read that out loud and comment upon what you have to say as to the accuracy of that particular report, sentence by sentence.

A. Do you want me to read it first?

Q. Yes, out loud, and a sentence at a time and comment upon it.

A. "When asked by the members of Local Board No. 9, [fol. 86] Boulder, Colorado, if he thought he was entitled to any other classification than that of 1-A, Mr. Gonzales replied, 'I am a minister and as such should be classified 4-D.' "

Q. All right, what have you got to say about that?

A. That's true.

Q. Go ahead.

A. " 'Also, a minister is automatically classified as a conscientious objector.' "

Q. Did you say that?

A. I did.

Q. All right, go ahead.

A. "The board replied that this statement was in error." That's true.

"Mr. Gonzales then went on to say that he had always made the claim that he was a minister even at the very beginning of his registration. He still made the statement that, 'If I am a minister I am a conscientious objector.' " That is not true.

"When asked if he would participate in the conscientious objector work program, he stated definitely not.

"Mr. Gonzales stated, 'I am a regular minister as defined under section 16 G part II of the laws and regulations set out by Selective Service Act of 1948.'" That's not true. "At present I am devoting an average of 100 hours a month to actual preaching publicly and from house to house, and an additional 50-75 hours in preparation for ministerial duties such as preparation for home Bible studies; calling back on good-will persons; attending congregational meetings, as well as training students to become ministers." That is not true.

"I also serve as Stock Servant for the local congregation." That is not true. "As you perhaps already know that the Selective Service National Headquarters has determined that Jehovah's Witnesses and the Watchtower Bible and Tract Society constitutes a recognized religious organization and that all Jehovah's Witnesses who are regularly and customarily teaching and preaching the doctrines and principles of the Bible as advocated by Jehovah's Witnesses as a vocation and not incidentally are entitled to exemption as ministers of religion." That is not true.

"These are some of the reasons I request a 4-D classification, so I would like for you to further consider my case as a minister of the gospel or would like to appear in person before the local board members for further consideration or discussion in regard to my case." I did not say that. [fol. 87] "When asked by the board if he had any further information to submit, he stated he submitted no new evidence except what was stated above, but would like to submit a certificate of marriage as the only new matter to be brought before the board," and I did submit the certificate of marriage.

Q. When did you submit that?

A. At the time of this hearing.

Q. Now then, just what was it that you did tell the Board on the occasion of that personal appearance, August 17th 1956? Just tell us what happened from the time you got there until you left.

A. I parked my car right in front of the Draft Board office and as I recall we were parking and I put a nickel in the meter and went upstairs and went into the first room there, and the clerk at the desk there said, "The members are busy right now; they will be with you in just a little bit." So I did sit down, and very shortly the clerk again said, "The members will see you now," so I went into the room where they were and I was introduced to the members.

They asked me if I had any new evidence I would like to file, and I told them that I had just the marriage certificate that I would like to put in my file. Also at this time I proceeded to open my Bible, and I told them that I would like to discuss with them concerning my ordination and ministerial duties, and at this point one of the members said to me, "We have heard all that before, and we have got our minds made up, and if there is anything that you want to do you will have to forward your papers to the Appeal Board." I started to leave and the clerk asked me if I would like to have my papers forwarded to the Appeal Board, and I said, "Yes," and it was the same day that they mailed me a small letter stating that such papers in that file had been forwarded to the Appeal Board.

Q. Now then, I have shown you the memoranda of the Local Board dated August 17th 1956. Did the Selective Service system or the Department of Justice ever at any time show you a copy of that memoranda?

A. No.

Q. When was the first time that you ever saw that memo?

A. At Mr. Covington's office, Mr. Erickson's office.

Q. Here in Denver?

A. Yes, sir.

Q. When was that, in reference to the indictment in this case, before or after this indictment?

A. Afterward.

Q. And before that when you were before the Board August 17th 1956 did any of these things occur that are mentioned there that you have disputed about the 100 hours and the 50 and 75 hours?

[fol. 88] A. No, there was nothing said about that.

Q. Now, how long were you at the Board at this personal appearance of August 17th 1956?

A. Well, the reason I took note of that was because, as I mentioned, it was meter parking and I put a nickel in the meter, and I went upstairs, and when I came back down I still had fifty-five minutes left on the meter, so I wasn't there over five minutes all together.

Mr. Covington: That's all, Your Honor.

Cross examination.

By Mr. Pfeiffer:

Q. Referring to your personal appearance of August 17th 1956, what were you going to tell the Board when you went up there? What was your purpose in going up there?

~~A. It~~ was to discuss my ministerial duties as to why I should have a 4-D classification.

Q. What were those duties? Were you telling them that you were a minister, or were you going to tell them that you were a regular minister at that time, how many hours you were devoting to your ministerial duties?

A. One thing I wanted to establish was my ordination, which I never was allowed to present before my Draft Board.

Q. Actually the thing you were going to do was to go up there and to quote from the Bible passages that you rely upon, is that correct?

Mr. Erickson: Object to that, Your Honor. What he went up to do and what he went up and was allowed to do is a different thing. What occurred is proper testimony; what he intended to do is a matter of speculation and improper.

Mr. Pfeiffer: If he had nothing new to advance up there, Your Honor, it seems to me that it is superfluous to hold the hearing.

The Court: The objection is overruled; you may proceed.

A. Well, as I said, I never was allowed to present before the Draft Board members from the scriptures passages concerning my ordination, which was one of the points that I wanted to establish with them.

Q. But that means quoting from the Bible, isn't that correct?

A. Partly, yes.

Q. What else were you going to do? Was that about all?

[fol. 89] A. No, I was going to refer to them concerning the time that I did spend in preparation for public talks and public ceremonies of an hour's length, for time spent in preparation of ceremonies given at our ministerial school, which I am enrolled in, and all the duties that I perform on calling back on people that are interested; the study of the Bible, and also people that are physically unable to get out, and duties of that nature.

Q. And you say that the Board wouldn't permit you to say that?

A. That's true.

Q. And the Board didn't listen to that at all?

A. No.

Q. So you didn't tell them, you didn't tell the Board at all, according to your testimony, how many hours you spent doing these matters, did you?

A. No, I did not.

Q. What were you going to tell them how many hours you spent doing them?

A. You say what was I going to tell them?

Q. Yes.

A. I, according to the schedule that I had made out, according to the way I spent my time was from approximately 75 to 100 hours a month in preparing and attending the meetings of Jehovah's Witnesses.

Q. In effect you were going to tell them, "I was devoting 75 hours a week and preaching publicly from house to house, and an additional 75 hours in preparation of ministerial duties as such, is that right?

A. No.

Mr. Covington: Your Honor, the witness used the term "month."

Q. I am sorry; it states here that, "At present I am devoting an average of 100 hours a month to actual preaching publicly from house to house, an additional 50 to 75 hours in preparation for ministerial duties as such, preparation for home Bible studies, calling back on good will persons, attending congregational meetings as well as training students to become ministers." Isn't that about what you were going to tell the Board?

A. No.

Q. What is the difference?

A. I was not at the time devoting 100 hours to preaching publicly, you see.

Q. And you didn't tell the Board that?

A. No.

Q. Now then, you stated that this statement is not true. You said, "I am a regular minister as defined by section (G) part II of the laws and regulations set forth in the Selective Service Act of 1948." Do you mean to state that you did not state that to the Board, or that the statement is not true?

A. I did not at such time make that statement.

Q. You did not make such a statement?

A. Not at that time.

[fol. 90] Q. Do you feel you are a regular minister within the meaning of that act?

A. Yes.

Q. So it is a true statement?

A. Yes, it is a true statement.

Q. Now, you had been through one personal appearance before, had you not?

A. That's true.

Q. And actually you had been through the Appeals before and you had received a report, an order to report for induction, and you had gone down to the induction station and failed to take the step forward, isn't that correct?

A. That's true.

Q. Then you received an order stating that the order to report for induction had been rescinded or cancelled, isn't that correct?

A. That's true.

Q. And then you started the same process all over, isn't that right?

A. Yes.

Q. So you have been through this twice, isn't that correct?

A. That's true.

Q. So the second time when you went through these various steps during the procedure you were pretty well acquainted with what was going on, were you not?

A. Yes, I knew to a certain extent what—

Q. And on your personal appearance on August 17th 1956 did you offer to reduce to writing what you wanted to present to the Local Board and submit a memorandum in writing as to what you wanted to submit to the Board?

A. Not at that time I didn't.

Q. You did not?

A. No.

Q. What time did you do it?

A. I say I didn't do it.

Q. You did not do it. Now, you stated that the first time that you saw this August 17th report was when you were in Mr. Erickson's office, isn't that right?

A. That's true.

Q. ~~But~~ you actually received the information on here about your working 100 hours prior to your indictment, did you not?

A. Yes.

Q. And that's what induced you to write this letter of April 23rd, isn't that right?

A. That's true.

Q. Now, I believe you stated that during the hearing before the hearing officer, I believe that was January 7th 1957 before Mr. Evensen—what did you state to him in regard to the circumstances surrounding defending yourself and others, self defense? What did you state to him?

A. I told him that we had a God-given right of self defense, and in support of that I had my Bible with me, and I opened it to the scripture at Nehemiah, the fourth chap- [fol. 91] ter, the 13th and 14th verses, and while I read it to him Mr. Evensen took notes of that.

Q. Took notes down?

A. Yes.

Q. And that in substance reads that you would fight in defense of yourself, your brethren, your sons, daughters, wife and home, isn't that true?

A. That's true.

Q. By "brethren" what do you mean by that?

A. The same word as brothers.

Q. Brothers?

A. Yes.

Q. Do you mean by "brethren" in your sect, isn't it all the members of the Jehovah Witness sect?

A. We no longer use the term of brethren.

Q. You don't use it any more?

A. No.

Q. What did it mean at the time that you stated to the hearing officer "brethren"?

A. It would read in the modern English, it would be "brothers" instead of "brethren."

Q. And so you don't refer to a member of your sect as one of the brethren, is that right?

A. We don't use the term.

Q. Well, reading that phrase over there again now it says, "He can defend himself, his brethren, his sons, daughters, wife and home," and it omits sisters, isn't that right, so then they differentiate between your brothers and your sisters, is that right?

Q. How was that now?

Q. The statement reads that you can fight in defense of yourself, your brethren, sons, daughters, wife and home. If you interpret brethren to be brothers that omits sisters from the phrase, does it not?

Mr. Erickson: That's argumentative, Your Honor, and I don't see how it has any relevance. I don't know what Mr. Pfeiffer is quoting from. Maybe if we knew that we would be better off.

Mr. Pfeiffer: It seems to me that the witness has stated that that's what he told the hearing officer on that date.

Mr. Covington: May it please the Court, if he is using that hearing officer's report I think we ought to have it in evidence.

Mr. Pfeiffer: I believe that what I am quoting from, Your Honor, is the report dated March 27, 1958 to the Chairman of the Appeal Board of the State of Colorado that is signed by T. Oscar Smith, and I am reading from page two, the third full paragraph, the last sentence of that paragraph, and I will quote it again.

[fol. 92] The Court: That's a part of the file?

Mr. Pfeiffer: That's part of the file.

The Court: Being Government's Exhibit 1?

Mr. Pfeiffer: Government's Exhibit 1.

The Court: All right.

Mr. Pfeiffer: And I would like to quote from it again.

By Mr. Pfeiffer:

Q. "Mr. Smith tells the Board that the hearing officer stated that the registrant quoted a Biblical passage in support of his belief that he could fight in defense of himself, his brethren, his sons, daughters, wife and home," and you made that statement, did you not?

A. I read it to him from the Bible.

Q. Do you believe that statement?

A. Sure, yes.

Q. Now then, Mr. Gonzales, you are a citizen of the United States, are you not?

A. That's true.

Q. And you did when you were eighteen years of age register with the Draft Board, did you not?

A. Yes.

Q. On May 2nd of 1957 you were classified 1-A by the Colorado State Appeal Board and you were so notified, isn't that correct?

A. I don't recall the date.

Q. But you were classified; you did receive notification you were classified 1-A?

A. Yes, sir.

Q. And then you did receive an order from your local draft board to report for induction, and that you were to report for induction into the armed forces on June 24th 1957?

A. That's true.

Q. And you did appear at the Old Custom House here in Denver, Colorado pursuant to that order, did you not?

A. Yes.

Q. But you knowingly failed to submit yourself to induction into the armed forces at that time?

Mr. Covington: Now, just a moment, if it please the Court. We object to the word "knowingly" because it calls for a conclusion, and besides that we have already stipulated on this matter, and it is repetitive, and we have agreed that he did fail to report for induction here in the City of Denver in the State of Colorado.

[fol. 93] The Court: All right, in view of this stipulation the objection will be sustained.

Q. Now, you did receive a notice—it is entitled Resume of Supplemental Inquiry from the Hearing Officer—did you not, Mr. Evensen? Did you receive that resume through the mail?

A. Yes.

Q. I would like to read the third paragraph of that to you. It says, "A congregational servant of the group the registrant is affiliated with, and that registrant spent twenty to twenty-five hours a week in church activity or preparation for study groups. He made available registrant's published record which he described as"—

The Court: Excuse me, you missed a couple of words there; maybe your copy is different from the original. I suggest you read it from this if you are going to ask him.

Mr. Pfeiffer: I wish you would strike that, please.

Q. Maybe you can follow me there, Mr. Gonzales. "The congregational servant of the group the registrant is affiliated with added that registrant spent twenty to twenty-five hours a week in church activity or preparation for study group. He made available registrant's publisher's record which he described as registrant's record of activities in preaching to the public. This record reflected that for the period from September, 1954 through September, 1956 registrant has devoted an average of approximately six and a half hours per month to preaching to the public." Is that statement correct?

A. That's true.

Q. That is true?

A. Yes.

Q. Now then, did you state to Mr. Evensen as to how much time you were devoting to your church activities?

A. Mr. Evensen?

Q. Yes.

A. No, at any time we didn't discuss that at all.

Q. You didn't discuss that?

A. No.

Q. I believe Mr. Covington has asked you as to whether or not you were asked about that. Did you ever bring the subject up yourself?

A. No.

Q. You did not?

A. No.

Q. Why?

A. Well, it was in the record there and I just didn't have any reason to bring it up at the time. I might state that Mr. Evensen said that the only thing that would be discussed at that time was my claim as a conscientious objector.

[fol. 94] Q. Didn't you think that what you do as far as your duties has anything to do with your being a conscientious objector?

A. That is true, but I wasn't questioned as to the amount of time spent in these particular duties.

Q. But you did not put forth the information, isn't that right?

A. That's right.

Q. And under that the hearing itself is not for purposes of interrogating you, is it? It is to permit you to have an opportunity to confront the evidence that is against you, isn't that correct?

A. That's true.

Q. And actually you saw the FBI report on your first hearing, did you not, on your first hearing before Mr. Mazzulla?

A. I was not mailed a copy of the resume before Mr. Mazzulla.

Q. You were not mailed a copy of the resume, but you saw the actual reports, did you not?

A. No.

Q. You did not?

A. No.

Q. Now, at the time of the hearing before Mr. Evensen you did not demand to see the FBI reports, did you?

A. No.

Q. Mr. Gonzales, referring to a letter that I believe you wrote to the Draft Board—it is dated June 11th 1957—I will read a portion of that to you. It is Local Board No. 9, 1933 11th Street, Boulder, Colorado: "Dear Sir: In *acknowledgement* of your letter of June 3rd I am writing to let you know that my wife is pregnant and would like to know if that would change my draft status for the present.

If not, perhaps you would allow me to stay until the baby is born. Thank you, sincerely yours, Raymond Gonzales, Jr." Did you write that letter?

A. Yes.

Q. At the time that you wrote that letter, referring again to the statement, "If not, perhaps you will allow me to stay until the baby is born," was it your intention to enter the service at that time?

A. No.

Q. Why did you want them to allow you to stay until the baby was born?

A. Well, it is the only time that I have been married and this was our first child and I did want to be present when it was born.

Q. Well now, the first time that you went down to report for induction and failed to report for induction you were not arrested, were you?

A. No, I have never been arrested.

Q. You just went on home, did you not?

A. Yes.

Q. And a month or so later you received this notice that the order had been cancelled and you went through the scheme again, isn't that correct?

A. Yes, sir.

Mr. Erickson: I object, Your Honor, to his argumentative phrase, "went through the scheme again."

[fol. 95] Mr. Pfeiffer: Did I say "scheme"?

The Reporter: Yes.

Mr. Pfeiffer: Excuse me, I withdraw the question.

Q. You went through the procedure again, didn't you?

A. Yes.

Q. So that you knew that at the time that you went down to the induction station and you failed to take the step forward that you would not be arrested and that you would go home, is that correct?

A. I was told that, yes.

Q. You were told that?

A. Yes.

Q. All right; then can you explain to me what you mean by the statement, "If not, perhaps you will allow me to stay until the baby is born." You were asking for an extension from the draft notice, isn't that correct?

Mr. Erickson: Your Honor, I think it is argumentative; I think the letter speaks for itself. The letter is the best evidence.

The Court: No, I don't think so. This is the man that wrote the letter and he might be able to explain it.

Mr. Erickson: I believe the Court would agree that the phrase that Mr. Pfeiffer used was argumentative, though, and not proper cross examination.

The Court: The objection is overruled.

Mr. Pfeiffer: Can you repeat the question?

(The last question was read by the reporter.)

The Court: Do you understand his question, Mr. Gonzales?

The Witness: Well, I really don't.

Q. Let's see if I can phrase it this way: You had received a notice that you were to report for induction on June 24th, isn't that correct?

A. Yes; I don't recall the day, but I did receive it.

Q. That was pursuant to this June 3rd 1957 document which is entitled, "Order to Report for Induction"?

A. Yes.

[fol. 96] Q. And you wrote the letter that I have read here a couple of times. You said, "In *acknowledgement* of your letter of June 3rd.".

A. Yes.

Q. You are actually asking about the last sentence on there that this order to report for induction be continued until a future date, is that correct?

A. Well, I can't say as I had that specifically in mind.

Q. What other June 3rd letter was there?

The Court: I think he has now answered the question.

Mr. Pfeiffer: All right, sir.

Q. Now, back in November of 1952 I believe it was submitted with your SS Form 150 with various affidavits, isn't that correct?

A. Yes, I did submit affidavits to the Draft Board.

Q. There were other people that submitted affidavits for you, is that correct, and in your behalf?

A. You mean that wrote them?

Q. Yes, wrote them, and I am referring to Bernallilo Gonzales, did he write one for you? Here, I will hand it to you.

A. Yes.

Q. Is he any relation to you?

A. Yes.

Q. What is that relation?

A. He is my uncle.

Q. He is your uncle?

A. Yes.

Q. Reading this here it says, "This is to certify that I, Bernallilo Gonzales, have known Raymond Gonzales, Jr. of Longmont, for the past eighteen years. He has been an active minister since he received his ordination April 3rd 1958. He has met the full requirements as a follower"— I am sorry, I can't see it.

The Court: "and imitator."

Q. —"and imitator of Christ Jesus. He is now a full-time minister devoting an average of 100 hours a month or 1,200 hours a year announcing the established Kingdom of Jehovah God as the only hope for all mankind for everlasting salvation." Is that a true statement?

A. I was at that time, yes.

Q. You were?

A. A full-time pioneer.

Q. What is the difference between a full-time pioneer and a full-time minister?

A. That's what I say, pioneer or minister.

Q. Pioneer or minister. In your sect are you a full-time *pionner* for awhile and then you are no longer a minister?

[fol. 97] A. No, no, actually in effect a pioneer is a full-time minister. That's what a pioneer is.

Q. So you are stating that in 1952 you were a full-time minister, but in 1956 you were not, is that correct?

A. That is true.

Q. When you no longer were a full-time minister did you notify the Local Board to that effect?

A. I don't recall.

Q. You have gone through the file, have you not, in this case, the copy that you have?

A. You say the copy that I have?

Q. Yes.

A. Yes, but I don't have anything pertaining to that.

Q. Actually in this hearing of August 17th 1956 you were actually trying to state to them that you were a minister, isn't that correct?

A. That's true.

Q. You were actually claiming a 4-D classification, isn't that right?

A. That's true, yes.

Q. So you were asserting that you were a minister?

A. Yes.

Q. But still you were only preaching six and a half hours a month, is that correct?

A. Publicly, yes.

Q. Now then, when was it that you stopped being a full-time minister of your sect?

A. I believe it was in—well, it was a period, a duration of six months, starting with October the 1st of 1952.

Q. Mr. Gonzales, you appeared before the Local Board twice, is that correct, for a personal appearance?

A. That is true.

Q. During either one of those times did you review your file with the Local Board?

A. No.

Q. You did not?

A. No.

Q. You knew you had the right to do that, didn't you?

A. Yes.

Q. But you did not choose to do that?

A. No.

Q. And also during your personal appearances, I mean your hearing before the hearing officer you knew you had the opportunity to review the file and the affidavits and the various matters you had submitted in the file with the hearing officer, is that right?

A. Yes.

Q. Did you do that with the hearing officer, Mr. Evensen?

A. No.

Q. You did not?

A. No.

Q. So then you did have an occasion to see this letter, did you not? You would have had an occasion to see this letter if it were in the file at the time of the hearing with Mr. Evensen, the letter or the statement made, personal [fol. 98] appearance of Raymond Gonzales, Jr., dated August 17th 1956?

A. I would have if I would have looked through it; it would have been there.

Q. You would have seen it, is that correct?

A. Yes.

Q. And you knew that anything that you wanted to submit that would have had a bearing upon these issues you could have submitted to the hearing officer, isn't that right?

A. That's true.

Q. And you also knew you had the right to do that at a personal appearance, isn't that correct?

A. That is, submitting documents or papers?

Q. That's right, documents.

A. Yes.

Q. And you did not submit any additional documents to the hearing officer?

A. No.

Q. Now then, in the letter that is signed T. Oscar Smith, here referring again to page two, and the full paragraph where I have quoted there, where you quoted from a Biblical phrase, "That he could fight in defense of himself, his brethren, sons, daughters, wife and home," you did not refute that statement in your letter of April 23rd 1957, did you?

A. You say I did not refute this statement?

Q. That's right, or explain it.

A. That is true.

Q. You did not?

A. I did not.

Q. But you are aware of that statement in that letter prior to receiving your notice of induction, is that right?

A. I was aware of that, yes.

Mr. Pfeiffer: That is the letter from T. Oscar Smith dated March 21st 1957. You may examine.

Mr. Covington: May it please the Court, we have no further questions.

The Court: All right, you may step down, Mr. Gonzales.

(Witness excused.)

Mr. Covington: We have no other evidence; we close our side of the case.

The Court: All right, any rebuttal, Mr. Pfeiffer?

Mr. Pfeiffer: I believe not, Your Honor.

The Court: All right, do you want to proceed with your argument?

[fol. 99]

Motion for Judgment of Acquittal and Denial Thereof

Mr. Covington: May it please the Court, I would like to make a motion for judgment of acquittal at this time and specify the grounds and then if the Court desires to hear oral argument on it I will be glad to argue.

Now comes the Defendant in this case pursuant to the rules of criminal procedure of this Court and makes this his motion for a judgment of acquittal at the close of all the evidence for each of the following reasons:

One, there is no basis in fact for the denial of the full conscientious objector claim by the Appeal Board, and therefore the final classification is arbitrary and capricious, thus making the final order void.

Two, the local board denied the Defendant procedural due process of law upon his personal appearance held on August 17th 1956 by refusing him the right to present all the evidence he wanted to present by cutting him off from a full hearing, by denying him the right to discuss his case and denying him the right to read from the Bible proof of his ordination, which was in issue as to his ministerial claim, all of which is contrary to Section 1624 of the Selective Service Regulations and the fair and just provisions of the Act.

Three, the Defendant was denied procedural due process of law by the Department of Justice, and the recommendation to the Appeal Board dated February 1st 1954 which relied upon the illegal and false standards for suggesting to the Appeal Board that the conscientious objector claim be denied, which statements were never withdrawn or thereafter corrected by the Department of Justice, and the later recommendation to the Appeal Board dated March 21st 1957, which invalidated the final order to report for induction.

Four, the Defendant was denied a full and fair hearing and procedural due process of law by the hearing officer of the Department of Justice upon the hearing conducted on January 7th 1957, because the hearing officer failed to give the Defendant an opportunity to explain the adverse evidence about exaggerating the number of hours devoted to the field ministry, and the reliance thereafter upon this by the Department of Justice and their recommendation to the Appeal Board without enabling the Defendant and confronting him with this point that they relied upon in the recommendation at the time of the hearing before the hear- [fol. 100] ing officer, and without giving him an opportunity to be heard on the position taken by the Department of Justice orally, and the personal appearance before the hearing officer denied procedural due process and invalidated the final order.

Five, the Defendant was denied procedural due process of law and a full and fair hearing before the Appeal Board by the Department of Justice through its recommendation dated March 21st 1957, which contained a false and misleading representation to the Appeal Board that the Defendant exaggerated his statements about the time he devoted to his ministry, by sending to the Appeal Board the resume of the FBI report which contained a false statement about the Defendant attempting to pick up a girl in the street at night, and also by withholding favorable evidence showing the sincerity of the Defendant's claim for a classification as a conscientious objector, and also by not forwarding to the Appeal Board the printed document containing the religious views of Jehovah's Witnesses on conscientious objection relied upon by the Defendant to participation in war, which was filed with the hearing officer at the hearing conducted by the hearing officer, all of which is contrary to the fair and just provisions of the Act and the due process clause of the Fifth Amendment, the United States Constitution, thus making the final order to report void.

Section 1626.25 of the Selective Service Regulations, 32 CFR, 1626.25 as amended on June 17th 1952 insofar as it provides for the omission of the report of the hearing officer made to the Department of Justice and not placing it in the Draft Board file, upon which report the final recommendation of the Department of Justice is based, is void because it is contrary to the Act and the plain intent of Congress in the enactment of the Selective Service Act of 1948 and the Universal Military Training and Service Act, whereby the Congress adopted the then standing and existing administrative policy that the hearing officer report be included in the file as commanded by Section 1626.25 of the Selective Service Regulations, 32 CFR 1626.25, as they existed from 1940 to June 17th 1952, which provided for the inclusion of the hearing officer's report in the Draft Board file, and also the current administrative interpretation that was put upon the Act by the Selective Service system from 1940 to 1952, requiring the placing of the hearing officer's report in the file of all conscientious objector's constituted a Congressional adoption of that interpretation which could not thereafter be changed or modified by the amendment of June 17th, 1952, 32 CFR 1626.25 which makes the final order void.

[fol. 101] Seven, the Defendant was denied procedural due process of law by the Department of Justice and a full and fair hearing before the Appeal Board through the Department of Justice not sending to the Appeal Board and including in the Draft Board file the report of the hearing officer of the hearing conducted on January the 7th 1957, which should have been sent to the Appeal Board for the consideration before the final classification, and included in the Draft Board file, all contrary to the Act and the due process clause of the Fifth Amendment to the Constitution.

Therefore, for each and every one of these grounds the Court should grant and enter a judgment of acquittal in this cause. Now, may it please the Court, on the separate grounds that I have stated we have the case of Davis vs. United States, 199 F. (2d), and Bejelis vs. United States, 206 F. (2d) 354, which decisions hold that the denial of a right of a registrant who is claiming to be classified as a minister of religion to read from the Bible and prove therefrom his ordination constitutes a violation of the requirements in the Act and the procedural requirements of due process of law.

* * * * * * *

[fol. 111] The Court: There is only one proposition that the Court is not satisfied concerning, and that is the applicability of this Ninth Circuit case that counsel for the Defendant referred to concerning the changed regulation, 1626.24 and so forth. I would like to be furnished with that case; I may be able to dispose of this matter yet this evening.

Mr. Covington: Your Honor, I have the case right here in the pamphlet form and the Court can read it, if you care to do so. It is a copy of the official report of the Ninth Circuit opinion.

The Court: Do either counsel have anything further? The Court is ready to rule on this matter.

Mr. Covington: Your Honor, I have nothing more than what I have said.

Mr. Pfeiffer: I have nothing further, Your Honor.

IN UNITED STATES DISTRICT COURT

MEMORANDUM DENYING MOTION FOR JUDGMENT OF ACQUITTAL

The Court: The motion for judgment of acquittal is denied. First the Court finds that there was evidence or is evidence in the file upon which the Local Board and the [fol. 112] appellate board could find that the Defendant was not entitled to the classification as a conscientious objector. In reaching this conclusion, of course, the Court is aware that there has been no system that has ever been devised or known to man that is foolproof in determining the sincerity of an individual in his or her beliefs, and the Court is not in making that finding saying that the finding of the Board or the Appeal Board is the same one that this Court might have made under similar circumstances, but under what this Court construes to be the law, if there is sufficient evidence upon which to base such a finding before the Court, this Court cannot substitute its opinion for that of the Draft Board or the Appeal Board, and therefore is bound by the ruling or finding of that Board.

Now, with reference to the other matters, concerning the contention that the Defendant was denied procedural due process at the hearing, his oral hearing on or about August the 16th 1956. It appears from the file, being Exhibit 1, that the Defendant was permitted to and did make certain statements at his personal appearance before the Board concerning his claim as to being a regular minister, and although he denied some of the statements when he orally testified, the Court is of the opinion that the report made or the statements made and which are a part of the file appear to be in its chronological place in the file, probably fairly reflect what took place at that time, because it would be assumed that bearing the date of August the 17th 1956 that it was made promptly after the hearing on August the 16th 1956, and the matters contained therein should have been fresh in the mind and memory of the clerk or other official who made that report.

The Court finds that due process, procedural due process was not denied the Plaintiff before his hearing at the Local Board on August the 16th 1956, and the Court also is of the opinion that procedural due process was not denied the Defendant by the Department of Justice in making its recommendation to the Appeal Board. The Department of Justice's recommendation is based on what appeared to it undoubtedly to have been the fact, and as has been stated *oftimes* in the arguments today, the recommendations of the Department of Justice in such cases are not binding upon the Appeal Board, and the fact that the Appeal Board accepts it does not in itself make it objectionable.

As to the claim or the contention of the Defendant that he was denied procedural due process at the hearing before [fol. 113] Mr. Evensen on January the 7th 1958, the Court finds that there were no substantial procedural rights that the Defendant was denied at that hearing. The Court had the opportunity of hearing Mr. Evensen's oral testimony at the trial today and is impressed with his sincerity. The Court permitted him to relate upon being interrogated by the Defendant's counsel, over the objection of the Government's counsel, what transpired pretty much in detail at that hearing in Pueblo on January 1st or 7th 1958, and the Court is of the opinion that there was no substantial difference in the fact as related by Mr. Evensen and those related by the Defendant, when he testified in the case of any great consequence.

I believe it was at this hearing that the book or pamphlet which has been referred to was submitted. That was my recollection. The Defendant's testimony is that that pamphlet was handed to Mr. Evensen at the close of Mr. Nelson's testimony. He said, "Here is a pamphlet that sets out the position of our people," or something to that effect, and Mr. Evensen said, "I will read it." There was no request made by anybody that it be made a part of the record in the case; it was merely an explanation by the witness of something or other. The Defendant himself did not ask that it be made a part of the record, nor did he say that he relied on it. The Defendant never said at the hearing or at least he never said it in court here today that he relied on the pamphlet or its teachings or whatever else might have been contained in it. It was a statement by Mr. Nelson that that pamphlet set out certain things.

As to the contention of Defendant that he, the Defendant, was denied procedural due process by the Appeal Board as the result of the Department of Justice having made some erroneous statements in its resume, the Court does not find that it did make erroneous statements, that is, erroneous statements of fact. The conclusions that they reached as a result of some of the statements may have been different than would have been reached by some other individual who studied them, but there was evidence in this file concerning the claimed ministerial status of the Defendant from the outset of this matter, that is, as early as 1952, I believe, or at least prior to any of the hearings that have been referred to, and the Court is of the opinion and finds that he was not denied due process, any procedural due process, by the Appeal Board in that connection.

The contention of the Defendant that the report of the hearing officer was not placed in the file and he was thereby [fol. 114] denied procedural due process, the Court is of the opinion that that contention is not well founded, that the evidence all through the case from the mouth of the Defendant himself indicates that anything he asked to see he was granted the permission to see, and in many instances he didn't even ask for certain things that might have been available. As I recall, the witness Mazzulla testified that it was his practice to permit the registrant to see anything in his file or any of the papers, and I believe he said that the report, while he wasn't sure whether it was in the file or on top of the file, but he had received it at the time he had received the other papers in connection with the case prior to the hearing which he held, and that it was available. He did not recall whether Defendant asked to see it or not. I do not believe that it is a requirement of the law, as the law and regulations are presenting written and interpreted, that the report of the hearing officer of the Department of Justice be made a part of the registrant's file so that it will be enclosed within the cover of the file as are the other instruments.

As to the last matter, that is, the contention that the Defendant was denied due process with the Department of Justice by not sending to the Appeal Board the report of the hearing officer, the Court is of the opinion that that contention is not supported by the evidence in the case, nor does it require that that be done. As I understand the regulations, why, the Department of Justice must make its recommendation to the Appeal Board, but it is not required that the report of the hearing officer be furnished by the Department to the Appeal Board.

For the reasons stated, as I stated at the outset, the motion for judgment of acquittal of the Defendant is denied. Now, does either counsel have anything further to say to the Court before he determines the case on its merits?

Mr. Pfeiffer: No, sir.

Mr. Covington: Nothing.

IN UNITED STATES DISTRICT COURT

COURT'S FINDINGS

The Court: The Court makes the following findings: That on May 17th 1952 the Defendant, Raymond Gonzales, Jr., was a male citizen of the United States and residing in the United States, and that pursuant to the rules and regulations prescribed under the Universal Military Train- [fol. 115] ing and Service Act, as amended, that he registered before Local Board No. 9 at Boulder, Colorado, and that thereafter through due process of classification the Defendant was classified in Class 1-A on November the 13th 1952, and was notified of such classification shortly thereafter; that subsequent to said date and on or about December 4th 1952 the Defendant was by the Local Board classified as 1-0, and that thereafter the Board on its own motion reopened Defendant's classification and on or about July the 30th 1953 he was again classified in 1-A;

That notice of said reclassification or classification in 1-A was in due course given the Defendant; that thereafter the Defendant requested a personal hearing before the Board, the Local Board, and the request was granted and such a hearing was had on August the 13th 1953. After said hearing the Defendant appealed his 1-A classification and his case was not reopened, and the classification 1-A remained and he was so notified in April, 1954;

That on July 20th 1956 Defendant's file was reopened and his classification was again considered by the Board, and on said date he was again classified as 1-A; that on July 25th 1956, on or about said date, the Defendant was notified that his previously issued order to report for induction was cancelled. Defendant requested a personal appearance before the Board, and that request was granted and he was given a personal appearance, was given a hearing, an oral hearing before the Board on August the 16th 1956;

That after said oral hearing and on or about August 17th 1956 the classification of Defendant was reopened and he was reclassified as 1-A, from which classification the Defendant appealed to the Appeal Board, and the Appeal Board sustained the classification of the lower Board, and on May the 14th 1957 the Defendant was notified that the Appeal Board had sustained and had classified him as 1-A; that thereafter on June 3rd 1957 the Defendant was mailed an order to report for induction on June 24, 1957, said order directing him to appear at the bus depot, 1765 14th Street, Boulder, Colorado, for forwarding to an induction station, and that thereafter on June 24th 1956 the Defendant reported at the headquarters of the U.S. Army Recruiting Main Station in the Old Custom House, Denver, Colorado, to which location he had been directed to report by the Board, Local Board No. 9;

And the Court finds that at said time and place, that is, on June 24th 1957 at the New Customs House Building in [fol. 116] Denver, Colorado the Defendant did knowingly fail, refuse and neglect to perform the duty required by him under the provisions of the Universal Military Training and Service Act of 1951, as amended, by not submitting himself to induction into the Armed Forces of the United States in accordance with the provisions of said Act. The Court, therefore, finds the Defendant guilty as charged in the indictment. Is the Defendant on bail?

Mr. Erickson: He is, Your Honor.

The Court: All right, do you want that bail continued?

Mr. Covington: Yes, Your Honor, and we might say this: We intend to take an appeal to the Tenth Circuit, and we have substantial questions of law that are involved and we would like that the bail be continued pending the disposition of the appeal. We will serve our notice of appeal within the ten days after the judgment is entered, and we respectfully request that the bail be continued pending disposition of the appeal.

Mr. Pfeiffer: We would have no objection to that, Your Honor. I do think that they will have to make a new bond at the time of sentencing, because I think the present bond just runs to the disposition of the trial of this case to sentencing time. The new bond will have to be made, but we would have no objection to the amount.

The Court: The bond will be continued, and of course the case will be continued for presentence report and for sentencing, and if a new bond is required by the law, why, of course, it will have to be furnished. I am not sure that it need be. On appeal, of course, if an appeal is made there will be required a bond, but until that time this bond will be continued and the Defendant will be released on this bond. Do either counsel have anything further at this time?

Mr. Pfeiffer: I just wondered, Your Honor, if the matter is going up on appeal it might be best that we do leave the exhibit as it is now instead of substituting photostats. Some of the photostats are pretty bad, but if we can get other substitutions we would like an order to substitute photostats if it becomes necessary.

Mr. Covington: We won't object to that; we are in favor of it providing that your photostats are clear enough that [fol. 117] they can be used, and that all the exhibits that are there are photostats. You mentioned that there were certain physical examinations that do not appear in the photostats. We are not interested in that; that is not relevant to any of the questions, but everything else we would like to have in the file.

Mr. Pfeiffer: Why don't we make arrangements to leave that there.

Mr. Covington: On appeal, that's all right with us.

The Court: All right, then the Exhibit 1, unless there is another order on Exhibit 1, it will be used and not substituted, unless you find you need it for some other purpose, and then you can make a motion. Do counsel have anything further?

Mr. Erickson: Nothing further, Your Honor.

The Court: The Court is in recess.

(Whereupon, the proceedings in the foregoing case were adjourned.)

Filed November 26, 1958.

[Plaintiff's exhibit 1 is the Selective Service System file. Three copies of the exhibit have been filed.]

DEFENDANT'S EXHIBIT A.

Department of Justice
Washington, D.C., February 1, 1954

Honorable Fred M. Mazzulla, Special Assistant to the Attorney General, Symes Building, Denver 2, Colorado.

Re: Raymond Gonzales, Jr., Conscientious Objector.

My dear Mr. Mazzulla: This acknowledges receipt of your report and the entire file in the above-captioned matter.

The registrant's file is being transmitted to the appropriate Appeal Board with the recommendation that the claim [fol. 118] be not sustained. Copies of your report and the report of the Federal Bureau of Investigation are being forwarded to the office of the United States Attorney.

Sincerely,

T. Oscar Smith
Special Assistant to the Attorney General

DEFENDANT'S EXHIBIT B.

Conscientious Objector Docket

Case No. 35005

File No. ....

Name Of Registrant Raymond Gonzales, Jr.

Address Rte. 1, Longmont, Colorado

Local Board No. 9

Address Boulder Boulder Colorado
City County State

Classification Sought Class 1 Subdiv. 0

Classification Given .... Class 1 Subdiv. A

Appeal Board State of Colorado

Address Denver, Colorado
City County State

Referred To U.S. Attorney—Date Received 8-26-53

Referred to D. of J., Washington, D.C. ....

Referred to F.B.I., Date 8-28-53

Notification To Deputy Atty. Gen., Date 8-28-53

Date Report Received From F.B.I. ....

Date Report Transmitted To Hearing Officer ....

Notification To Deputy Atty. Gen., Date ....

Place Of Hearing 514 Symes Bldg., Denver, Colo.

Date Of Hearing November 4, 1953. 11:00 A.M.

Witnesses For Registrant

Name	Address
Bernardino Gonzales	Uncle
Donald P. Johnson	Friend
Ramon G. Gonzales, Sr.	Father

Other Witnesses

None

[fol. 119] Proceedings

Hearing held on the 4th day of November, 1953 at 514 Symes Bldg., Denver, Colorado.

Recommendations Of Hearing Officer

That appeal of registrant based upon grounds of conscientious objection be not sustained. It is, therefore, recommended by this Hearing Officer that the registrant be classified 1-A.

Date Transmitted To D. Of J. November 4, 1953.

Date Transmitted To Appeal Board By D. Of J. ....

DEFENDANT'S EXHIBIT C.

November 5, 1953

Charles S. Vigil, United States Attorney, District of Colorado, 209 Post Office Building, Denver 1, Colorado.

Re: Raymond Gonzales, Jr., Route 1, Longmont, Colorado. S.S. No. 5 9 34 58, File No. 35005

Dear Mr. Vigil: The following information is given you in order that you may complete your docket sheet in the above case:

Place of Hearing: 514 Symes Bldg., Denver 2, Colorado.

Date of Hearing: November 4, 1953—11:00 A.M.

Witnesses for Registrant: Bernardino Gonzales—Uncle, Donald P. Johnson—Friend, Ramon G. Gonzales, Sr.—Father.

Other Witnesses: None.

Proceedings: Hearing held on the 4th day of November, 1953, at 514 Symes Bldg., Denver, Colorado

Recommendations of Hearing Officer: That appeal of registrant based upon grounds of conscientious objection be not sustained. Recommend that the registrant be classified 1-A.

Date transmitted to D. of J.: November 4, 1953.

Respectfully yours,

Fred M. Mazzulla, Hearing Officer
514 Symes Building, Denver 2, Colorado

[fol. 120]

DEFENDANT'S EXHIBIT D.

United States Department of Justice
United States Attorney
District Of Colorado
Post Office Building
Denver 1, Colorado
October 12, 1953

In Reply Refer To
csv/s
(35005)

Mr. Fred M. Mazzulla, 514 Symes Building, Denver, Colorado.

In re: Raymond Gonzales, Jr.

Dear Mr. Mazzulla: I am enclosing herewith the file of local Board No. 9 at Longmont, Colorado with reference to the above-named conscientious objector, together with the following reports of the Federal Bureau of Investigation:

Report of Special Agent Robert K. Buresh, dated at Denver, Sept. 8, 1953;

Report of Special Agent Harold J. Sullivan, dated at New York, Sept. 22, 1953;

Report of Special Agent Robert D. Kinsey, dated at Omaha, Sept. 23, 1953;

Report of Special Agent Robert K. Buresh, dated at Denver, Oct. 2, 1953; and

Report of Special Agent Robert K. Buresh, dated at Denver, Oct. 12, 1953.

Please hold the necessary hearing in this matter. I am also enclosing for your file copy of Conscientious Objector Docket in this case.

Very truly yours,

Charles S. Vigil,
United States Attorney

[fol. 121]

DEFENDANT'S EXHIBIT E.

November 4, 1953

Conscientious Objector Section, Department of Justice,
Washington 25, D.C.

Gentlemen: Pursuant to suggestions contained in memorandum to hearing officers appointed pursuant to Section 6(j), and dated September 9, 1948, and signed by Tom C. Clark, Attorney General, I transmit the entire file and record, together with two copies of findings of fact and recommendation, in the following case:

Raymond Gonzales, Jr., Conscientious Objector, S.S. No. 5 9 34 58, File No. 35005.

Very respectfully yours,

Fred M. Mazzulla, Hearing Officer
514 Symes Building, Denver 2, Colorado

FMM/ct
Encs.

Clerk's Certificate (omitted in printing).

Plaintiff's Exhibit No. 1—Selective Service File

(See Opposite) ☞

SSS Form No. 1

SELECTIVE SERVICE SYSTEM

REGISTRATION CARD

SELECTIVE SERVICE NUMBER

5 9 34 58

[Registrar will not enter Selective Service number]

1. Name

Gonzales, Jr., Raymond (NMN)

(Last) (First) (Middle)

2. Place of residence Rt. 1

Longmont Boulder Colorado

(City, town, village, or county) (State)

[The place of residence given on the line above will determine Local Board jurisdiction]

3. Mailing address

Same as #2

4. Name and address of person who will always know your address

Mr. Raymond Gonzales, Sr., (Father), Same address

5. Date of birth

March 15, 1934

(Month) (Day) (Year)

6. Place of birth

Valencia Co., N.Mex

(City, town, village, or county) (State or country)

7. Occupation Minister

Stone Mason

8. Firm or individual by whom employed

Dewey Summers (Stone Quarry)

9. Nature of business, service rendered, or chief product

cut stone - Also acts as minister for Jehovah Witness

10. Place of employment or business

Lyons Boulder Colorado

(Town) (County) (State)

11. Local board with which registered under Selective Training and Service Act of 1940, as amended

Never Registered

12. Were you ever rejected for service in the armed forces? Yes ☐ No X When?

13. Marital status: Single X Married ☐ Living with wife ☐ Separated ☐ Divorced ☐ Widowed ☐ Farm

[fol. 1a]

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[fol. 1]

14. Active duty in the armed forces of the United States or a cobelligerent nation since Sept. 16, 1940:

no (Branch of Armed Forces) (Service or serial number) (Date of entry)

(Name of last organization) (Date of separation)

15. Present membership in a reserve component of the armed forces:

no (Branch of Armed Forces) (Service or serial number) (Date of entry)

(Grade and organization)

I affirm that I have verified the foregoing answers and that they are true:

(Signature of registrant)

DESCRIPTION OF REGISTRANT

16. Color of eyes Brown Color of hair Black Complexion Olive

Height (approx.) 5 ft. 6 in. Weight (approx.) 140 Race Wh

Other obvious physical characteristics that will aid in identification:

No

I certify that my answers are true; that the person registered has read or has had read to him his own answers; that I have witnessed his signature or mark and that all of his answers of which I have knowledge are true, except as follows:

No exceptions

March 17, 1952 (Date of registration) Jennie D. Payne (Signature of registrar)

Registrar for local board 9 (Number) Boulder, (City or county) Colorado (State)

Local Board No. 9
1933-11th Street
Boulder, Colorado

(Stamp of the Local Board of jurisdiction as determined by item 2, front of card)

U. S. GOVERNMENT PRINTING OFFICE 16—65561-1

Form approved
Budget Bureau No. [illegible]

SELECTIVE SERVICE SYSTEM

CLASSIFICATION QUESTIONNAIRE

Selective Service No. 5 | 9 | 34 | 58

Date of mailing October 21, 1952

Date received back at local board ....

Date of birth: March 15, 1934 (Month) (Day) (Year)

Name: Gonzales, Jr., Raymond — (Last) (First) (Middle)

Address: Rt. 1 (Number and street or R. F. D. route)

Longmont Boulder Colorado (City, town, or village) (Zone) (County) (State)

Local Board No. 9
Boulder County
1933 - 11th Street
Boulder, Colorado

(Local Board Stamp)

NOTICE TO REGISTRANT

You are required by the Selective Service Regulations to fill out this questionnaire truthfully and to return it to this local board on or before the date shown below. Willful failure to do so is punishable by fine and imprisonment.

THIS QUESTIONNAIRE MUST BE RETURNED ON OR BEFORE October 31, 1952

Clerk ~~or Member~~ of Local Board.

(The above items are to be filled in by the local board before the questionnaire is mailed to the registrant.)

INSTRUCTIONS

This questionnaire is intended to furnish the local board with information to enable it to classify you. You will receive notice from your local board of your classification.

The registrant is required to sign the certificate on page 7. If another person assists the registrant in completing this questionnaire, the person assisting is required to complete the statement following the registrant's certificate. Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making, or being a party to the making, of any false statement or certificate regarding or bearing upon a classification.

If the registrant is an inmate of an institution and is unable to complete the questionnaire, the executive head of the institution shall communicate these facts immediately to the local board.

1. Make no alterations in the printed matter in this questionnaire.

2. All spaces in this questionnaire that apply to registrants must be completed with the appropriate words or check marks.

3. If you furnish additional information or affidavits with your questionnaire, attach the same securely to it.

4. **If you are now on active duty with the Armed Forces, obtain a certificate to that effect from your commanding officer. Execute only Series I and II of the questionnaire and return it, with certificate attached, to your local board.**

5. **After this questionnaire has been returned,** report to your local board at once any change of address, any change in place of employment or occupation, or any **other new fact which may affect your classification.**

Statements in this questionnaire are confidential as prescribed in the Regulations

USE INK OR TYPEWRITER IN FILLING OUT THIS FORM

STATEMENTS OF THE REGISTRANT

Series I.—IDENTIFICATION

INSTRUCTIONS.—Every registrant shall complete all statements in this series.

1. My name is (print) Gonzales (Last) RAYMOND JR. (First) — (Middle)

2. In addition to the name given above, I have also been known by the name or names of

-NONE (If none, write "None")

3. My address now is Route 1 Reed Ave (Number and street or R. F. D. route)

Longmont (City, town, or village) (Zone) Boulder (County) Colo (State)

4. My telephone number now is NONE (Town) (Exchange) (Number) (If you have no phone, write "None.")

5. My Social Security number is 522-42-0999 (If none, write "None")

Series II.—PRESENT MEMBERS OF ARMED FORCES

INSTRUCTIONS.—Every registrant who is a member of one or more of the groups named in this series shall supply the information called for under the appropriate item or items.

1. (a) I am at present on ACTIVE DUTY in the Armed Forces, the Coast Guard, the Coast and Geodetic Survey, or the Public Health Service as a .... (Grade, rank, or rating) in the .... (Branch of Armed Forces)

(b) Service or serial number .... (c) I entered on active duty .... (Date)

(d) My present tour of active duty will terminate .... (Date)

2. (a) I am at present a member of a reserve component of the Armed Forces, NOT ON ACTIVE DUTY as a .... (Grade, rank, or rating) in the .... (Branch of Armed Forces)

(b) I entered into such component on .... (Date)

(c) I .... (am, am not) performing service in such component by satisfactorily participating in scheduled drills and training periods as prescribed by the Secretary of Defense.

3. (a) I am at present (check appropriate box) enrolled in the advanced course, senior division, Reserve Officers' Training Corps ☐ or the Air Reserve Officers' Training Corps ☐; a member of the Naval Reserve Officers' Training Corps entered upon the junior or senior year ☐; a midshipman, United States Naval Reserve ☐; in the .... (College or university)

(b) I acquired such status on .... (Date)

4. (a) I am selected for enrollment or continuance in the senior division, Reserve Officers' Training Corps ☐; the Air Reserve Officers' Training Corps ☐, the Naval Reserve Officers' Training Corps ☐; I am appointed a midshipman, United States Naval Reserve ☐; and I have agreed in writing to accept a commission if tendered and to serve, subject to call by the Secretary of the Army, the Secretary of the Air Force, or the Secretary of the Navy, not less than 2 years on active duty after receipt of a commission.

(b) I was selected on .... (Date) (c) The above agreement was signed .... (Date)

3. I [illegible] and accepted [illegible] the [illegible] of the [illegible] a period commencing on [illegible]

Series III — PRIOR MILITARY SERVICE

INSTRUCTIONS.—Every registrant who has been on active duty as a member of the Armed Forces of the United States, the Coast Guard, [illegible] with the Armed Forces of the [illegible] or the armed forces of an [illegible] shall complete the statements in this series. Use a separate line for each term of service listing last service first. If none, write "None."

2. [illegible] in attending any of the special and/or college training programs under the jurisdiction of the Army, Navy, Marine Corps, or Coast Guard, or as a cadet or midshipman at one of the armed service academies? Yes [illegible] No [illegible]

3. If your answer to Question 2 is "Yes," give the name of the program [illegible] date of entry [illegible] (Month) (Day) (Year) and date of release [illegible] (Month) (Day) (Year) from such specialized training or academy.

Series IV — OFFICIALS DEFERRED BY LAW

1. I am at present the Governor of a State, Territory, or Possession, a public official chosen by the voters of an entire State, Territory, or Possession, a member of the legislative body of the United States or of a State, Territory, or Possession, a judge of a [illegible] of the United States or of a State, Territory, or Possession or the District of Columbia; my office is [illegible] (If none, write "None.")

2. My term of office expires [illegible] (Date)

Series V — SOLE SURVIVING SON

I [illegible] (am, am not) the sole surviving son of a family of which one or more sons or daughters were killed in action or died in line of duty while serving in the Armed Forces of the United States or subsequently died as a result of injuries received or disease incurred during such service.

Series VI — MINISTER, OR STUDENT PREPARING FOR THE MINISTRY

INSTRUCTIONS.—Every registrant who is a minister or a student preparing for the ministry shall complete the statements in this series that apply to him.

1. (a) I am (am, am not) a minister of religion. (b) I DO (do, do not) regularly serve as a minister.

(c) I have been a minister of JEHOVAHS WITNESSES (Name of sect or denomination) since ~~APRIL~~ AUGUST 14 1947. (Month) (Day) (Year)

(d) I HAVE (have, have not) been formally ordained. (e) If formal ordination was performed, it was on APRIL 3 1947 (Month) (Day) (Year) by RAY OWENS (Name of official who performed the ordination) at SCOTTSBLUFF NEBRASKA (Address)

2. (a) I [illegible] (am, am not) a student preparing for the ministry under the direction of [illegible] (Name of church or religious organization) in a theological or divinity school.

(b) I am attending the [illegible] (Name of theological or divinity school) located at [illegible]

3. I [illegible] (am, am not) a student preparing for the ministry under the direction of [illegible] (Name of church or religious organization) pursuing a full-time course of instruction leading to my entrance into [illegible] (Name of theological or divinity school) located at [illegible] in which I have been pre-enrolled.

[fol. 3a]

Series VII.—FAMILY STATUS AND DEPENDENTS

INSTRUCTIONS.—Every registrant shall complete this series.

1. (a) I have never been married ☑; I am a widower ☐; I am divorced ☐; I am married ☐ (Check appropriate box) (b) I .... (do, do not) live with my wife; if not, her address is ....

(c) We were married at .... (Place) on .... (Date)

2. (a) I have .... (Number) (If none, write "None") children under 18 years of age.

(b) Of those children, ... (Number) live with me in my home.

3. I have .... (Number) persons other than those shown above, wholly or partially dependent upon me for support.

NOTE.—Every registrant should submit to the local board on a separate sheet attached to this questionnaire any additional information concerning his status with respect to persons dependent upon him for support which he believes should be considered by the local board.

Series VIII.—PRESENT OCCUPATION

1. Every registrant must check each of the following boxes appropriate to his case and follow the instructions indicated.

(a) I am now working on a farm, orchard, or ranch. ☐ If this box is checked, complete Series IX.

(b) I am now working in a nonagricultural occupation. ☑ If this box is checked, complete this series.

(c) I am now a full-time student. ☐ If this box is checked, complete Series XI.

(d) I now have no employment nor am I a full-time student. ☐ If this box is checked, complete Parts 7 and 8 of this series.

2. The job I am now working at is (give full title, for example: Construction draftsman, turret-lathe operator, stationary engineer, farm laborer, prosecuting attorney, physics teacher, policeman, marriage-license clerk, etc.):

EXTRA GANG At Steffen House IN Sugar Mill

3. I do the following kind of work in my present job (Be specific. Give a brief statement of your duties.):

EXTRA GANG weigh Lime AND Molasses, etc

4. In my present job, I am (Check one box only)—

(a) A regular or permanent employee, working for salary, wages, commission, or other compensation ☐;

I have worked .... years in my present trade, and I .... (do, do not) expect to continue indefinitely in it.

(b) A temporary or occasional employee ☑; I expect that my present job will end about Dec. 31, 1952 (Date)

(c) An apprentice under a written or oral agreement with my employer, which expires .... (Date) ☐.

(d) An independent worker, working on my own account, not hired by anyone, and not hiring any help ☐.

(e) Working for my father or for the head of my family, but receiving no pay ☐.

(f) An employer or proprietor hiring .... (Number) paid workers ☐.

5. My employer is Great Western Sugar Co.
(Name of organization or proprietor, not foreman or supervisor; write "Self" if self-employed)

EAST 3Rd AVE. LONGMONT, COLORADO
(Address of place of employment—Street, or R. F. D. Route, City, and State)

whose business is Sugar Mill
(Nature of business, service rendered, or chief product)

6. (a) I was employed by present employer on Oct. 16, 1952 (Date)

(b) I entered job described in Statements 2 and 3, this series, on Oct. 16, 1952 (Date)

V

[fol. 4]

(c) I am paid at the rate of $ 1.25 per hour ☒; day ☐; week ☐; month ☐.
(Check appropriate box)

(d) I work an average of 56 hours per week.

2.

7. Other business or work in which I am now engaged in [redacted]
(Nature of business—if none, write "None")

8. Prior work experience Stone cutter, Truck Driving, Farming

NOTE.—You may attach to this page a statement giving additional information which you think the local board should consider in determining your classification, which statement will then become a part of this questionnaire. Your employer may submit to the local board any information concerning your employment which he thinks the local board should consider in determining your classification.

Series IX.—AGRICULTURAL OCCUPATION

INSTRUCTIONS.—Every registrant who works on a farm, orchard, or ranch shall complete this series.

1. I work on or operate a farm, orchard, or ranch as (Check appropriate boxes)—

(a) Sole owner-operator of the farm ☐.

(b) Joint owner-operator with ______ (Name) ______ (Address) ☐.

(c) Hired manager for ______ (Name) ______ (Address) ☐.

(d) Cash tenant or renter ☐
(e) Standing rent tenant ☐
(f) Share cropper ☐
(g) Share tenant ☐

My agreement with ______ (Name of landlord)
expires ______ (Month) (Day) (Year)

(h) Wage hand (hired man) ☐ ______ (Name and address of employer)
(i) Unpaid family worker ☐

2. I have been engaged in farm work continuously since ______ (Date)   3. I ______ (do, do not) live on the farm where I work.

4. I ______ (am, am not) actually and personally responsible for the operation of the farm where I work.

5. The principal crops and livestock of the farm I operate or work on are:

Names of Crops	Acres Devoted to Each	Kinds of Livestock	Number of Each Now on Farm

6. Total value of products sold from this farm during the last crop year $ ______

7. Principal products marketed during the last two years ______

8. The number of year-round workers on this farm is ______ (Number) of whom ______ (Number) are hired hands.

9. I am paid at the rate of $ ______ per hour ☐; day ☐; week ☐; month ☐.
(Check appropriate box)

10. Other facts which I consider necessary to present fairly the farming or farm work I have described and my connection with it as a ground for classification are (if none, write "None") ______

11. Other business or work in which I am now engaged ______ (Nature of business—if none, write "None")

12. Prior work experience ______

NOTE.—You may attach to this page a statement giving any additional information which you think the local board should consider in determining your classification, which statement will then become a part of this questionnaire. Your employer may submit to the local board any information concerning your employment which he thinks the local board should consider in determining your classification.

[fol. 4a]

Series X.—EDUCATION

1. I have completed 8 (Number) years of elementary school, 0 (Number) years of junior high school, and 0 (Number) years of high school.

2. I WAS NOT (was, was not) graduated from high school.

3. I have had the following schooling other than elementary and high school (if none, write "None"): NONE

Name of College, University, Preparatory, Trade or Business School	Course of Study	Length of Time Attended Degrees or Certificates Granted

Series XI.—STUDENTS

INSTRUCTIONS.—Every registrant who is a full-time high school or college student, except those who have completed Series VI above, shall complete this series. A student who believes that he should be placed in a deferred class because of his student status should file with the local board the necessary supporting evidence.

1. (a) I am a full-time student at ____ (Name of institution)

located at ____, majoring in ____

preparing for ____ (Occupation or profession)

(b) I expect to receive from this institution a ____ (Kind of certificate, diploma, or degree; if none, write "None")

on ____ (Date)

(c) I intend to take an examination for license in ____ (Profession) (If none, write "None") on ____ (Date)

Series XII.—CITIZENSHIP

INSTRUCTIONS.—(1) Every registrant shall complete the statements numbered 1 and 2 in this series.

1. I was born at LOS LUNAS (Town or county) NEWMEXICO (State) AMERICA (Country) on MARCH 15, 1934 (Date)

2. I am a citizen or subject of AMERICA (Country)

INSTRUCTIONS.—(2) Every registrant who is not a citizen of the United States shall also complete the statements numbered 3, 4, and 5 when applicable.

3. My alien registration number is ____

4. I ____ (Have, have not) filed a Declaration of Intention to become a citizen of the United States.

5. I filed my Declaration of Intention at ____ (City) (State) on ____ (Month) (Day) (Year) under No. ____

Series XIII.—COURT RECORD

INSTRUCTIONS.—Every registrant shall complete this series.

1. I have been convicted of crimes, other than minor traffic violations, as recorded below; if none, write "None." List all convictions, last conviction first.

Offense	Date of Conviction (Month, Day, Year)	Court (Name and Location)	Sentence
(Last conviction) NONE			

2. I ____ (am, am not) now being retained in the custody of a court of criminal jurisdiction, or other civil authority.

Specify ____ (Awaiting trial, on parole, etc.)

[fol. 5]

Series XIV.—CONSCIENTIOUS OBJECTION TO WAR

INSTRUCTIONS.—Any registrant who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form shall sign the statement below requesting a Special Form for Conscientious Objector (SSS Form No. 150) from the local board.

By reason of religious training and belief I am conscientiously opposed to participation in war in any form and for this reason hereby request that the local board furnish me a Special Form for Conscientious Objector (SSS Form No. 150) which I am to complete and return to the local board for its consideration.

Raymond Gonzales Jr.
(Signature)

Series XV.—PHYSICAL CONDITION

INSTRUCTIONS.—Every registrant shall complete this series. Any registrant who answers any of the questions listed below by "Yes" and who believes himself physically disqualified for service in the Armed Forces may attach an affidavit from his physician, hospital, or sanatorium to support his claim.

1. Do you have any physical or mental condition which, in your opinion, will disqualify you from service in the Armed Forces? Yes ☐; No ✓
2. If the answer to Question 1 is "Yes," state the condition from which you are suffering
3. Are you now, or have you ever been, an inmate or a patient in a mental hospital or institution? Yes ☐; No ✓
4. Are you now, or have you ever been, an inmate or a patient in a tuberculosis hospital or sanatorium? Yes ☐; No ✓
5. If the answer to Question 3 or Question 4 is "Yes," give the name and address of each hospital, institution, or sanatorium
6. Have you had treatment from a physician for any condition within the last 5 years? Yes ☐; No ✓
7. If the answer to Question 6 is "Yes," state each condition from which you suffered and give the name and address of the physician who attended you, and dates of each treatment

REGISTRANT'S STATEMENT REGARDING CLASSIFICATION

INSTRUCTIONS.—It is optional with registrant whether or not he completes this statement, and failure to answer shall not constitute a waiver of claim to deferred or other status. The local board is charged by law to determine the classification of the registrant on the basis of the facts before it, which will be taken fully into consideration regardless of whether or not this statement is completed.

In view of the facts set forth in this questionnaire it is my opinion that my classification should be Class IV D

The registrant may write in the space below or attach to this page any additional statement which he believes should be brought to the attention of the local board in determining his classification.

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—1. Every registrant shall make the registrant's certificate. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the person who assists him in completing this questionnaire. 3. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Selective Service Act of 1948 as amended.)

I, Raymond Gonzales Jr., certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing ARC (are, are not) in my own handwriting.

Registrant sign here ☞ Raymond Gonzales Jr.
(Signature or mark of registrant)

(Signature of witness to mark of registrant)

Date Oct, 29, 1952

(Signature of witness to mark of registrant)

If another person has assisted the registrant in completing this questionnaire, such person shall sign the following statement:

I have assisted the registrant herein named in preparation of this questionnaire because

(For example—registrant unable to read and write English, etc.)

(Signature of person who has assisted)

(Registrants Will Make No Entries on This Page)

Dates	Minutes of Actions by Local Board and Appeal Board	Vote Yes	Vote No
10-8-52	SSS Form 150 mailed		
11/13/52	I-A	3	
11-14-52	110 mailed		
12/4/52	O 110 mailed	3	
6-18-53	Form 223 mailed to Report for Pre-Induct. 7-8-53		
7-8-53	DD 62 mailed acceptable		
7-30-53	1A 110 mailed		
8-4-53	Letter written to registrant arranging a personal appearance before the Local Board for August 13, 1953, at 1:30 p.m.		
8-13-53	Registrant made a personal appearance before the Board. The Board gave registrant the right to appeal his I-A classification, which he did. His appeal was taken 8-13-53 and his file sent to the Appeal Board at Denver. The action taken at this meeting was duly entered into the Minutes of Action Report. SSS Form 110 given to registrant - case not reopened-I-A aff.		
4-5-54	File r turned from State Appeal Board. Registrant was placed in class I-A by vote of 3-0. Form 110 mailed.		
5-2-56	Marital form mailed		
5-28-56	SS 252 mailed to rep for Ind 6/11/56		
6/26/56	(Case reopened & classification considered anew (Order to Report for Induction is hereby cancelled. I-A.		
7-25-56	110 mailed & also letter mailed cancelling order to report for induction		
8-6-56	Registrant requested personal appearance before local board Request granted & notice sent to appear 8/17/56 at 1:30 p.m.		
8-17-56	Registrant personally appeared before local board. Classification reopened. Reclassified I-A. Mailed Form 110 (Notice of Classification)	3	
8-22-56	Appeal from 1-A taken this date by registrant ~~[illegible]~~		
8-27-56	Forwarded to Appeal Board		
5-14-57	SSS 110 mailed to registrant showing I-A by Appeal Board 3-0		
6-3-57	SSS 252 mailed to registrant to report for induction 6/24/57		

[fol. 6]

Raymond Gonzales Jr.
Route 1 Reed ave.
Longmont, Colorado
Selective Service No. 5-9-34-58

Local Board No. 9
Boulder County
1933 - 11th Street
Boulder, Colorado.

Dear Sirs:

In regard to classification questionnaire under section, "Registrant's statement regarding classification" I would like to state further that I am now a full time minister spending a minimum of 100 hours a month in actual preaching. I have also been serving as, "Theocratic ministry School Instructor" and "Stock Servant" at the Longmont Company of "Jehovah's witnesses." I have served as ministry School Instructor since March 1, 1952, as "Stock Servant" since April 17, 1951. At present I am working temporarily at the sugar mill at night which allows me time for my preaching work.

Raymond Gonzales Jr.

OFFICES:
Administration
COLUMBIA HEIGHTS
Publishing
ADAMS STREET

PHONE
MAIN 5-1240
CABLE
WATCHTOWER
BROOKLYN

WATCHTOWER
BIBLE AND TRACT SOCIETY
INCORPORATED
[illegible]
PUBLISHING 117 ADAMS STREET · BROOKLYN 1, N.Y.

SW April 17 1951

Longmont Colo
company of Jehovah's witnesses

Dear Brethren

The Society is herewith appointing the following brethren to serve in the positions designated below. Each one is obligated to the Lord to faithfully study Counsel on Theocratic Organization for Jehovah's witnesses and obediently carry out his duties as outlined therein. Where changes are made, the newly appointed servant will receive from the former servant all forms, records and files pertaining to his duties. If no appointment is shown below, then the present appointed servant will continue to serve. This letter is to be retained as a permanent record in the company file.

Company servant:
Address

Assistant company servant: Grover Martin
Address Rte 1 Box 76 Longmont Colo

Bible study servant: Joe Gonzales

Territory servant:

Advertising servant:

Accounts servant:

Stock servant: Raymond Gonzales Jr

School servant:

Watchtower study conductor:

Book study conductors: Add: Joe Gonzales, Norbert Bourland

Your fellow ministers of Jehovah God,

Watchtower B & T Society Inc

SC 38a 3/50

[fol. 7a]

OFFICES:
Administration
124 COLUMBIA HEIGHTS
Publishing
117 ADAMS STREET

WATCHTOWER
BIBLE AND TRACT SOCIETY
INCORPORATED
[illegible]
PUBLISHING · 117 ADAMS STREET · BROOKLYN 1, N.Y.

PHO
MAIN S
CAB
WATCHT
BROOK

SW March 1, 1952

Longmont, Colo.
Company of Jehovah's witnesses

Dear Brothers:

The Society is herewith appointing the following brothers to serve in the positions designated below. Each one is obligated to the Lord to faithfully study Counsel on Theocratic Organization for Jehovah's Witnesses and obediently carry out his duties as outlined therein. Where changes are made, the newly appointed servant will receive from the former servant all forms, records and files pertaining to his duties. If no appointment is shown below, then the present appointed servant will continue to serve. This letter is to be retained as a permanent record in the company file.

Company servant:
Address

Assistant company servant:
Address

Bible study servant:

Territory servant:

Advertising servant:

Accounts servant:

Stock servant:

School servant: **Ray Gonzales, Jr.**

Watchtower study conductor.

Book study conductors: **Delete: Bernadino Gonzales**

Your fellow ministers of Jehovah God,

Watchtower B. & T. Society, Inc.

SC-39a 6/51

WATCHTOWER
BIBLE AND TRACT SOCIETY
INCORPORATED
PUBLISHERS · 117 ADAMS STREET · BROOKLYN 1, N.Y.

Date SPA OCT 1 1952

THIS CARD CONSTITUTES YOUR PIONEER ASSIGNM

to witness in territory of the Longmont, Colo.
company, obtaining territory locally from the servant. This includes
districts. Please show this card to the company servant as his notific
your assignment and authorization to supply you with literature at
rates. *Return it to this office when you are through working there.*

Servant:

Your fellow witnesses,

Watchtower Bible and Tract Society

This assignment cancels all previous assig

SP-21 5/53

Printed in

NT

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Inc.

ments.

S. A

POST CARD

Place
Stamp
here

RAYMOND GONZALES JR 7
RTE 1 REED AV
LONGMONT
COLO

10-58

OFFICES
Administration
124 COLUMBIA HEIGHTS
Publishing
117 ADAMS STREET

WATCHTOWER
BIBLE AND TRACT SOCIETY
INCORPORATED

PUBLISHING · 117 ADAMS STREET · BROOKLYN 1, N.Y.

OCT 1 1952

P[illegible]IONEER APPOINTMENT

RAYMOND GONZALES JR 7
RTE 1 REED AV
LONGMONT
COLO

10-52

Dear Fellow Witness:

JEHOVAH GOD has decreed that the true worship shall [illegible] these last days to the ends of the earth. It is a real joy [illegible] [illegible] that your application to share more fully in that expan[illegible] a pioneer minister of [illegible] has been accepted. [illegible] constitutes your pioneer appointment. You are now enrolled [illegible] Society's records as a full-time minister, effective as [illegible] appearing above.

In this capacity you enjoy a close and confidential rela[illegible] ship to the Society, as its representative. Your responsibili[illegible] before Jehovah and his organization will be to carry out the [illegible] time requirements by diligent, consistent activity in the f[illegible] outlined in Counsel on Theocratic Organization [illegible] Witnesses. The pioneer service is now your vocation, the work of [illegible] importance in your life. If the need exists, it is entirely pr[illegible] [illegible] secular work from time to time, or regularly week after week [illegible] obtain funds necessary to continue in full-time service. But [illegible] secular work must ever overshadow your service as a minister, for [illegible] you hold a most blessed position, which you should cherish [illegible] strive to retain in the preaching period still ahead.

Special-literature rates will be granted you as a pioneer [illegible] [illegible] pioneers, and may order [illegible] from the Society. These rates are allowed to the pioneers only [illegible] literature used in their personal field service. Pioneers may [illegible] literature to duly enrolled pioneers at special rates if necessary. But literature received at pioneer rates is [illegible] placed [illegible] company publishers at company rates. Pioneers working [illegible] territory may supply new interest with literature at company [illegible] until they get started, informing the Society at the end [illegible]

[fol. 8c]

month of the amount of literature [illegible] your account will be charged with the difference between pioneer and company rates.

As a pioneer you are required to [illegible] in the field of the [illegible] a quota of 100 hours a month, or 1,200 hours a year, performing the ministry from house to house, by means of back-calls and Bible studies, in magazine work and in other ways, generally engaging in all features of the service. The figure [illegible] quota. If you are able to [illegible] service, we feel sure you [illegible] blessings as a result.

Report cards and other pioneer supplies are being sent to you under separate cover. A complete report of your service activity is to be sent to the Society on the pioneer report card promptly at the end of the month, and no later than the third day of the fol- the end of the month, and no later than the third day of the following month. Your pioneer report card should be mailed without being enclosed in an envelope. If because of sickness or for any other reason you are unable to reach the minimum of hours some month, an explanation of the shortage should be made on the bottom of the card. In future months you should endeavor to make this up [illegible] the monthly average of 100 hours, or 1,200-hour yearly quota. Report each month regardless of the time put in.

Make a careful study of Counsel on Theocratic Organization for Jehovah's Witnesses, particularly that portion relating to the pioneer publishers. Study the Informant as it comes each month, and apply its instructions in your ministry. If serving in company territory, attend regularly and support all company meetings, and fully co-operate in the various features of Kingdom activity. Do not neglect diligent personal study of the Bible and each issue of The Watchtower. This is essential if you are to remain strong and equipped for good works.

In order that the Society may keep in direct communication with you at all times, be sure to notify us of any change of address on one of the regular "Change of Address" forms at least two weeks in advance. Use of the "Change of Address" form will help to avoid delay in receiving your Watchtower or Awake! magazines, Informant, special letters or other correspondence. Seven copies of each issue of the magazines will be sent to you regularly for use in the field.

As you begin your full-time ministry, be of good courage. Keep always in mind that the King is ruling, and your commission is to bear constant testimony to that fact. Go forth with complete confidence in the Lord and in the strength of his sustaining spirit. Have faith in God and his King-Son Christ Jesus as the unerring Signal. Be bold yet not rude; fearless yet kind and considerate of the rights of others. Do not become discouraged if problems or difficulties arise, but know for a certainty that the God of the universe will back you up until the last vestige of wickedness is destroyed at Armageddon and further full-time service privileges open up to you in the new world.

We wish you Jehovah's rich blessing and protection as you take up the treasured full-time pioneer ministry—a service to the Most High God.

Your brothers united with you in advancing true worship,

Watchtower B. & T. Society, Inc.

[fol. 9]

Norbert Bourlard
Rt 3, BOX 244
Longmont, Colo.
Nov. 20, 1952

To whom It may Concern:

I Norbert Bourlard do testify that I have known Raymond Gonzales for 3 yrs. He Raymond Gonzales is and has been a minister of the Gospel and active to the Commission set out before him. Also I state that he is a clean example to all that hear him. And at present is a full Time minister of Jehovahs Witn Also so a Theocratic Teacher in our School of ministry

Norbert Bourlard

STATE OF COLORADO) SS
COUNTY OF BOULDER)

The foregoing instrument was acknowledged before me this 20th day of November, 1952 by Norbert Bourlard.

WITNESS my hand and official

[fol. 9a]

seal the day and year mentioned beforehand.

Frances M. Achley
Notary Public

BOULDER COUNTY, COLORADO

My Commission expires April 4, 1955

[fol. 10]

Raymond Gonzales Jr
Route 1 Reed ave
Longmont, Colorado
Selective Service no 5/9/34/53
Nov. 22, 1952.

Local Board no. 9
Boulder County
1933 -11th Street
Boulder, Colorado.

Dear Sirs:

I recieved my classification card, 1-A last Saturday November 15, 1952, and I am not satisfied with that classification. As I stated in my questionnaire I am an ordained and regulor minister of the Gospel, and opposed to participation in wars in any form, combatant and non-combatant duties. therefore I feel that my classification at present should be accordingly.

I am a regulor minister as defined under section 16 G part II of the laws and regulations set out by Selective Service act of 1948. at present I am devoting an average of 150 hours a month to actual preaching publicly and from house to house, and an additional 50-75 hours in preparation for ministery duties such as; preparation for home Bible studies, calling back on good-will persons, attending congregational meetings, as well as training students to become ministers. I also serve as Stock Servant for the local congregation.

As you perhaps already know that the Selective Service National Headquarters has determined that Jehovah's Witnesses and the Watchtower Bible and Tract Society constitute a recognized religious organization and that all of Jehovah's Witnesses who are regularly and customarily teaching and preaching the doctrines and principles of the Bible as advocated by Jehovahs Witnesses as a vocation and not incidentally are entitled to exemption as minister of religion.

The foregoing statements are some of the reasons why I appeal a IV D classification. So I would like for you to further consider my case as a minister of the Gospel or would like to appear in person before the local board members for further consideration or discussion in regard to my case.

I am now closing hoping that the proper steps will be taken in further consideration of my case.

Yours truly,

Raymond Gonzales Jr.

[fol. 11]

Longmont Colo.
Nov. 20, 1952.

To whom it may concern. This to testify that I, Grover Martin have known Aaron Gonzales Jr. for the past seven years, and know that he is now actively engaged as a minister of religion in the organization known as Jehovahs Witnesses, that he is devoting one hundred hours or more per month to ministerial work.

He also has charge of the class for training student ministers, he is recognized as an ordained minister by this organization.

Grover Martin

STATE OF COLORADO)
COUNTY OF BOULDER) SS

The foregoing instrument was acknowledged before me this twenty-second day of November, 1952 by Grover Martin.

WITNESS my hand and official seal.

Notary Public

[fol. 11a]

I Henry Stanski a minister of the most high Jehovah God, hereby declare this 21st day of November 1952 that I have known Raymond Gonzales for about 5 years. During this time he has been associated with the Longmont Company of Jehovah Witnesses and he has been engaged in the ministry work. He has been the school servant of the Theocratic ministry school for about 1 year. At the present time he is also a full time minister

Signed before me this
21 day of Nov. 1952 A.D.

Notary Public
My Commission expires August 13, 1955

Henry Stanski
Box 226
Fredrick, Colorado.

Bernardino Gonzales
329 3rd Avenue
Longmont, Colorado
November 22, 1952

To whom it may concern:

This is to testify that I, Bernardino Gonzales, have known Ramond Gonzales Jr. of Longmont, Colorado, for the past eighteen years.

He has been an active minister since he received his ordination April 3,1949. He has met the full requirements as a follower and imitator of Christ Jesus. He is now a full time minister devoting an average of 100 hours a month or 1,200 hours a year announcing "The established kingdom of Jehovah God" as the only hope of all mankind for everlasting salvation. In his ministry work he distributes Bibles and Bible literature, also conducts home Bible studies, performing public street preaching, distributing Bible magazines and leaflets. He is qualified for delivering public sermons in the different congregations of Jehovahs Witnesses.

At present he is serving as the Ministry School Instructor for the local congregation of Jehovah's Witnesses. (Isaiah 61:1-2; Acts 20:20)

Raymond Gonzales,Junior, has faithfully continued to carry out his responsibilities and obligations as a minister and would be hard to replace in case of his absence, so I do think that his case should be considered and should be classified accordingly.

Bernardino Gonzales
Bernardino Gonzales

Presiding Minister of Jehovah's Witnesses in Longmont, Colorado

Subscribed and sworn to before me
this 22nd day of November, A.D. 1952
My Commission expires March 3rd 1953
Lance W Newby
Notary Public

[fol. 12]

Form approved.
Budget Bureau No. 33-R[illegible]

SELECTIVE SERVICE SYSTEM

SPECIAL FORM FOR CONSCIENTIOUS OBJECTOR

Selective Service No. 5 | 9 | 34 | 58

Date of mailing October 31, 1952

Date received back at local board

Local Board No. 9
Boulder County
- 11th Street
Boulder, Colorado
(Local Board Stamp)

Name Gonzales, Jr. (Last) Raymond (First) - (Middle)

Address Rt. 1 (Number and street or R. F. D. route)

Longmont (City, town, or village) Boulder (County) Colorado (State)

This form must be returned on or before November 5, 1952 (Five days after date of mailing or issue)

INSTRUCTIONS

A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on this special form, which when filed shall become a part of his Classification Questionnaire (SSS Form No. 100).

The questions in Series II through V in this form are intended to obtain evidence of the genuineness of the claim made in Series I, and the answers given by the registrant shall be for the information of only the officials duly authorized under the regulations to examine them.

In the case of any registrant who claims to be a conscientious objector, the local board shall proceed in the prescribed manner to determine his proper classification. The procedure for appeal from a decision of the local board on a claim of conscientious objection is provided for in the Selective Service Regulations.

Failure by the registrant to file this special form on or before the date indicated above may be regarded as a waiver by the registrant of his claim as a conscientious objector: *Provided*, that the local board, in its discretion, and for good cause shown by the registrant, may grant a reasonable extension of time for filing this special form.

Series I.—CLAIM FOR EXEMPTION

INSTRUCTIONS.—The registrant must sign his name to either statement A or statement B in this series but not to both of them. The registrant should strike out the statement in this series which he does not sign.

(A) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form. I, therefore, claim exemption from combatant training and service in the Armed Forces.

(Signature of registrant)

(B) I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form and I am further conscientiously opposed to participation in noncombatant training and service in the Armed Forces. I, therefore, claim exemption from both combatant and noncombatant training and service in the Armed Forces.

(Signature of registrant)

Under the provisions of section 6 (j) of the Universal Military Training and Service Act, as amended, any person who claims exemption from combatant training and service in the Armed Forces of the United States because he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and such claim is sustained by the local board, shall, if he is inducted into the Armed Forces, be assigned to noncombatant service as defined by the President, or shall, if found to be conscientiously opposed to participation in such noncombatant service, in lieu of induction, be ordered by his local board, subject to regulations prescribed by the President, to perform for a period of twenty-four consecutive months such civilian work contributing to the maintenance of the national health, safety, or interest as the local board deems appropriate, and any such person who fails or neglects to obey such order of the local board shall be subject to imprisonment for not more than five years or a fine of not more than $10,000, or to both such fine and imprisonment.

Series II.—RELIGIOUS TRAINING AND BELIEFS

INSTRUCTIONS.—Every question in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Do you believe in a Supreme Being? Yes ☒ No ☐

2. Describe the nature of your belief which is the basis of your claim made in Series I above, and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

[illegible]

[fol. 13a]

3. Explain how, when, and from whom or from what source you received the training and acquired the belief which a

of your claim made in Series I above.

Through Religious family training and individual and congregational meetings of Jehovah's Witnesses at 327 3r
Longmont, Colorado. Main source of training from and through
Watchtower Bible and Tract Society publications and Bible.

4. Give the name and present address of the individual upon whom you rely most for religious guidance.

Watch-tower Bible and Tract Society"
117 Adams St. Brooklyn, New York.
also Bernardino Gonzales 329 3rd ave. Longmont, colo.

5. Under what circumstances, if any, do you believe in the use of force?

The only time I would use force to the extent of killing
be to protect my immediate family from danger. If [illegible]
was trying to kill them or if I was out preaching and someone
attacked me I would not fight if I could leave the crowd as
John 8. 59; 10.31

6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consiste

depth of your religious convictions.

According to God's [illegible] and my beliefs I am now demonstrating
my beliefs through preaching from house to house and
publicity of God's Kingdom as the only hope for all mankind.
According to my conscience I realize that this is the most
important and profitable work to be engaged in. Matt. 1[illegible]

7. Have you ever given public expression, written or oral, to the views herein expressed as the basis for your claim made

I above? If so, specify when and wh

By engaging in house to house ministry work I have
publicly declared that I believe in a [illegible] Kingdom
extent of taking up full-time ministry and dedicating
time to doing this work of making known the good news
of God's Kingdom" the only hope for all mankind. Acts [illegible]
for no monetary gain. Matt. 10: 7,8

Series III.—GENERAL BACKGROUND

INSTRUCTIONS.—Every question in this series must be fully answered. If more space is necessary, attach extra s

paper to this page.

1. Give the name and address of each school and college which you have attended, together with the dates of your atte

and state in each instance the type of school (church, military, commercial, etc.).

Name of School	Type of School	Location of School	Dates Atte From
Los Lunas Municipal school	Public school	Los Lunas, New Mexico	1940
Twin Mound school	Public school	8 miles east of Loveland, colo	1943
Berthoud school	Public school	2 mi. south of Berthoud	1945
[illegible] school	Public school	2 miles south of Longmont	1946

2. Give a chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or

which you have at any time been engaged, whether for monetary compensation or not, giving the facts indicated below wit

each position or job held, or type of work in which engaged.

Type of Work	Name of Employer	Address of Employer	Period Wo From—
Farming	Pete Saffelaf	Longmont, colo.	1946
Farming	George Daniel	Longmont, colo	1948
Cutting stone	Lindy Summers	Lyons, Colorado	1951
Laborer	[illegible]	[illegible]	1952
			19
			19

3. Give all addresses and dates of residence where you have formerly lived

Name of City, Town, or Village	State or Foreign Country	Street Address or R. F. D. Route	Dates of Residence From	To
Los Lunas	New Mexico	Gen Delivery Los Lunas	1934	1942
Fort Collins	Colorado	Route 1	1942	1943
Loveland	Colorado	Route 1	1943	1945
Berthoud	Colorado	Route 1	1945	1946
Longmont	Colorado	Route 1 Rural ave	1946	1952
			19	19

4. Give the name and address of your parents and indicate whether they are living or not.

[illegible]

[illegible]

5 (a) State the religious denomination or sect of your father [illegible]

(b) State the religious denomination or sect of your mother [illegible]

Series IV.—PARTICIPATION IN ORGANIZATIONS

INSTRUCTIONS.—Questions 1, 2, and 3 in this series must be fully answered. If more space is necessary, attach extra sheets of paper to this page.

1. Have you ever been a member of any military organization or establishment? If so, state the name and address of same and give reasons why you became a member.

NO

2. Are you a member of a religious sect or organization? yes (Yes or no) If your answer to question 2 is "yes," answer questions (a) through (e).

(a) State the name of the sect, and the name and location of its governing body or head if known to you.

Watchtower Bible and Tract Society
117 Adams St. Brooklyn, New York.

(b) When, where, and how did you become a member of said sect or organization?

1942, Los Lunas New Mexico, through my parent and family religious training.

(c) State the name and location of the church, congregation, or meeting where you customarily attend

Jehovah's Witnesses Kingdom Hall, 321 2nd ave.

(d) Give the name, title, and present address of the pastor or leader of such church, congregation, or meeting

Bernardino Gonzales, 329 2nd ave.

(e) Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war

Exodus 20:13 "Thou shalt not kill" also Matt. 22:39, states, thou shalt love thy neighbor as thyself. ver. 40 the greatest commandments and if we love our neighbor as ourselves then surely we would not [illegible] out and kill [illegible] of [illegible] [illegible] them. [illegible] John 18:36 states that his Kingdom is no part of this world so we do not fight for this Kingdom, instead we [illegible] [illegible] Matt 24:14

3. Describe your relationships with and activities in all organizations with which you are or have been affiliated, other than military, political, or labor organizations.

Religious organization: Jehovah's Witnesses. Only Minister of said religious organization. Theocratic ministry school [illegible] [illegible] [illegible] servant or literature keeper

[fol. 14a]

Series V.—REFERENCES

Give here the names and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

Name	Full Address	Occupation or Position	Relationship to You
Grover Martin	[illegible] Longmont	[illegible]	[illegible]
Bernardino Gonzales	329 [illegible] ave Longmont colo.	[illegible] Cutter	[illegible]
[illegible]	[illegible] Longmont	[illegible]	[illegible]
[illegible]	331 Baker [illegible] Longmont	[illegible]	[illegible]

REGISTRANT'S CERTIFICATE

INSTRUCTIONS.—1. Every registrant claiming to be a conscientious objector shall make this certificate. 2. If the registrant cannot read, the questions and his answers thereto shall be read to him by the person who assists him in completing this questionnaire. 3. If the registrant is unable to sign his name he shall make his mark in the space provided for his signature in the presence of two persons who shall sign as witnesses.

NOTICE.—Imprisonment for not more than five years or a fine of not more than $10,000, or both such fine and imprisonment, is provided by law as a penalty for knowingly making or being a party to the making of any false statement or certificate regarding or bearing upon a classification. (Universal Military Training and Service Act, as amended).

I, [illegible], certify that I am the registrant named and described in the foregoing statements in this questionnaire; that I have read (or have had read to me) the statements made by and about me, and that each and every such statement is true and complete to the best of my knowledge, information, and belief. The statements made by me in the foregoing are in my own handwriting.
(are, are not)

Registrant sign here Raymon Lenza
(Signature or mark of registrant)

(Signature of witness to mark of registrant)

(Signature of witness to mark of registrant)

If another person has assisted the registrant in completing this questionnaire, such person shall sign the following statement:

I have assisted the registrant herein named in preparation of this questionnaire because

(For example: registrant unable to read and write English, etc.)

(Signature of person who has assisted)

(Occupation of person who has assisted)

(Address of person who has assisted)

Series H.

Religious Training and Beliefs
2. According to God's word at John 18:36
We as Christians do not fight for
worldly kingdoms which are doomed
for destruction Daniel 2:44. We
advocate God's Kingdom as the
only hope for all mankind.
We fight not against flesh
and blood but against the wicked
spirit forces in heavenly places,
with the sword of the Spirit
which is God's word the Bible.
Ephesians 6.10-17. Matt. 6:33.

Selective Service No
5 9 34 58

I-O

Approval of Budget Bureau not required

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR ARMED FORCES PHYSICAL EXAMINATION

Local Board No. 9
Boulder County
1933 - 11th Street
Boulder, Colorado
(Local Board Stamp)

June 15, 1953
(Date of mailing)

To Raymond (First name) — (Middle name or initial) Gonzales, Jr. (Last name) 5 9 34 58 (Selective Service Number)

Mailing address Rt. 1 (Number and street or R. F. D. route)

Longmont (City, town, or village) (Zone) Colorado (State)

You are hereby directed to present yourself for Armed Forces Physical Examination to the Local Board named above by reporting at:

Bus Depot, 1765-14th St., Boulder, Colorado
(Place of reporting)

at 7:10 A (Hour of reporting) m., on the 1st (Day) of July (Month), 19 53

Asst. Clerk (Member or clerk of Local Board)

IMPORTANT NOTICE

TO ALL REGISTRANTS:

When you report for Armed Forces Physical Examination you will be forwarded to an Armed Forces Examining Station where you will be given a complete physical examination to determine whether you are physically qualified for service. Upon completion of your physical examination, you will be returned to this Local Board. You will be furnished transportation and meals and lodging when necessary. Following your Armed Forces Physical Examination your Local Board will mail you a certificate issued by the commanding officer of the station showing whether or not you are acceptable for service.

If you are employed, you should advise your employer of this order and inform him that the examination is merely to determine your acceptability for service. It is not an order to report for induction or an order to perform civilian work.

If you have had previous military service, bring your service records with you. If you wear glasses, bring them with you.

If you are so far from your own Local Board that reporting in compliance with this order will be a hardship and you desire to report to the Local Board in the area in which you are now located, take this Order and go immediately to that Local Board and make written request for transfer for Armed Forces Physical Examination.

TO CLASS I-A AND I-A-O REGISTRANTS:

If you fail to report for Armed Forces Physical Examination as directed, you will be delinquent and will be immediately ordered to report for induction into the Armed Forces. You will also be subject to fine and imprisonment under the provisions of the Universal Military Training and Service Act, as amended.

TO CLASS I-O REGISTRANTS:

The Armed Forces Physical Examination is given for the purpose of determining your acceptability for service. If you are found acceptable, you will be available, in lieu of induction, to be ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest. If you fail to report for or to submit to the Armed Forces Physical Examination, you will be deemed to be available to be ordered to perform civilian work in the same manner as if you had taken the Armed Forces Physical Examination and had been found acceptable.

SSS Form No. 223 (Revised 11-20-52) (Supplies of previous printing shall be used until exhausted except for I-O Registrants) 16—37079-4 GPO

Raymond Gonzales Jr.
Rt. 1 Reed Ave
Longmont. Colo.

U.S. POSTAGE 37

LONGMONT COLO.
AUG-3'53

RETURN RECEIPT REQUESTED

Local Board No.
Camera Bldg.
Boulder, Colo.

REGISTERED
NO. 247

[fol. 19a]

LONGMONT
AUG
3
1953
COLO.

LONGMONT
AUG
3
1953
COLO.

Raymond [illegible]
Route 1 River Ave
Longmont, Colorado
July 3, 1953
S.S. No. 5-9-34-53

Local Board No. 9
Boulder County
[illegible] 1953
[illegible] Street
Boulder, Colorado

Local Board No. 9
Boulder, Colorado.

Dear Sirs.

In concern with the I-A Classification I received I would like to state that I am dissatisfied with such and am therefore requesting a personal appearance before the local draft board members to discuss my claim for a different classification in [illegible] of evidence information [illegible] Conscientious Objectors

Respectfully yours,

Raymond [illegible]

Raymond Gonzales Jr.
Route 1 Reed ave.
Longmont, Colorado
July 3, 1953
S.S. no. 5-9-34-58

Local Board no. 9
Boulder, Colorado.

Local Board No. 9
Boulder County
AUG [illegible] 1953
1935 - 11th Street
Boulder, Colorado

Dear Sirs:

In regard to the classification of I-A. I have just recieved I would like to state that I am appealing to the appeal board in view of the evidence submitted as a conscientious objector.

Sincerely yours,

Raymond Gonzales Jr.

C O Letter

[fol. 21a]

SELECTIVE SERVICE SYSTEM

Local Board No. [illegible]
[illegible] Street
[illegible], Colorado

(LOCAL BOARD STAMP)

August 13, 1953

STATEMENT

Raymond Gonzales, Jr., 5-9-34-58

Wm. O. DeSouchet, Fred G. Wencel and John M. Palmer were the members present at the Local Board meeting held August 13, 1953. Colonel Howard E. Reed was a guest at the meeting.

When Raymond Gonzales, Jr., appeared at the Local Board office for his personal appearance, he stated he was a Jehovah Witness, and as such he wished to appeal his I-A classification.

The local board, upon reviewing the file of this registrant, reconsidered the information contained in his S S Form 150, wherein it was noted that he believes in force to the extent that he would defend his person, his church, and his home by killing, if necessary. This, in the Board's opinion, brings them to the conclusion that he should not be classified as a Conscientious Objector.

The Board's opinion concerning this matter was duly entered into the Local Board Action & Minutes.

DEPARTMENT OF JUSTICE

Washington, D. C.

February 1, 1954

Chairman, Appeal Board for the
District of Colorado
Selective Service System
1619 [illegible] Street
Denver, Colorado

Re: Raymond Gonzales, Jr.

Dear Sir:

As required by section 6(j) of the Universal Military Training and Service Act, an inquiry was made in the above-mentioned case and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Honorable Fred M. Mazzulla, Hearing Officer for the District of Colorado.

The registrant is nineteen years of age and has a grade school education. He is a member of the Jehovah's Witnesses sect and claims exemption from both combatant and noncombatant military service.

A resumé of the investigative report made in this matter is attached hereto and made a part hereof.

The registrant states in his SSS Form No. 150 that the main source of his religious training is from and through the Watchtower Bible and Tract Society publications and the Bible. The following excerpts are taken from an article entitled "Why Jehovah's Witnesses Are Not Pacifists" which was published in the Watchtower, February 1, 1951:

> "The smearing of us as extreme pacifists is without foundation and is a deliberate lie to provoke prejudice against us ... Extreme pacifism is not our predicament. We are not pacifists ... to charge that we are extreme pacifists is a lie.

[fol. 22a]

> "As defined by Webster's New International Dictionary pacifism means 'opposition to war or to the use of military force for any purpose; especially an attitude of mind opposing all war, emphasizing the defects of military training and cost of war and advocating settlement of international disputes entirely by arbitration.' Such pacifism not even the Bible itself can be charged with teaching and neither can Jehovah's Witnesses who stick most scrupulously to the Bible."

The article continues by tracing the history of Jehovah's Witnesses to biblical times and then declares: "In all that history of almost six thousand years, the record fails to show Jehovah's Witnesses accusable of 'opposition to war or to the use of military force for any purpose' which is the definition of pacifism." There follows a discussion and justification of the wars engaged in by the pre-Christian witnesses of Jehovah. Such conduct is explained and defended in this manner:

> "But you ask how can they be conscientious objectors and not at the same time pacifists? They are not against war between the nations and they do not interfere with the war effort of the nations nor with anyone who can conscientiously join in such efforts. They fight only when God commands them to do so because then it is theocratic warfare."

The registrant appeared personally for his hearing and the Hearing Officer reported, in part, as follows:

> "It is the conclusion of this Hearing Officer that the registrant has not established that he is a conscientious objector within the meaning of Section 6(j) of the Universal Military Training and Service Act. He has established to the satisfaction of this Hearing Officer that he is a sincere member of Jehovah's Witnesses and a believer in its tenets, but the teachings of this sect and the beliefs expressed by this registrant do not establish to the satisfaction of this Hearing Officer that the registrant is opposed to war in any form."

The Hearing Officer recommended that the registrant's claim be not sustained.

After consideration of the entire file and record, the Department f Justice finds that the registrant's objections to combatant and oncombatant service are not sustained. It is, therefore, recommended o your Board that the registrant's claim for exemption from both ombatant and noncombatant training and service be not sustained.

The Selective Service Cover Sheet in the above case is returned erewith.

Sincerely,

Oscar Smith

T. Oscar Smith
Special Assistant to the Attorney General

[fol. 23a]

[illegible]

[illegible] Sicurella, Jr.

[illegible]

The [illegible] attended [illegible] Burlington School, south of [illegible], Colorado through the eighth grade. Teachers found the [illegible] to be [illegible], neat and clean. They related that the [illegible] refused to salute the flag on religious grounds.

[illegible] found him an excellent worker, [illegible] him [illegible] honest and fair in his deal-

[illegible] advised that the registrant was a quiet and orderly young [illegible] whose reputation and [illegible] are good. They had not discussed with the registrant his attitude toward military service and they advised that he is very active in the Jehovah's Witnesses sect. They consider him to be sincere in his beliefs.

References and fellow members of the Jehovah's Witnesses sect advised that the registrant is a very active, sincere member of the Jehovah's Witnesses sect and they consider him to be in good faith in his conscientious-objector claim.

A School Servant and Record Clerk of the Watchtower Bible and Tract Society of Brooklyn, New York, advised that the registrant was ordained a Jehovah's Witnesses minister on April 3, [illegible] and that he became a full Pioneer on October 1, [illegible], serving in that capacity until April 1, 1953. The Servant also stated that the registrant received the following appointments from the society: Stock Servant, April [illegible], 1951; Theocratic Ministry School Instructor, March 1, 1952; Bible Study Servant, February 13, 1953; Area Study Conductor, [illegible], 1953. The Servant explained, in view of the amount of work being handled by the registrant, he no longer is a Pioneer and is not devoting 100 hours per month in Kingdom preaching and that he has relinquished his position as a Bible Study Servant.

5-9-34-58

Local Board No. 9
Boulder County
MAY 10 1956

Local Board No. 9
Boulder County
MAY 10 1956

May 9, 1956
Raymond Gonzales Jr.
S.S. no. 5-9-34-58

Local Board no. 9
Boulder County
1933-11th St.

Dear Sirs;

the answer to your letter of may 2. my address is now, "Box 285 west end Station, Colo. Springs, Colo." However my folks still live at Rt. 1 Box 130 Reed ave. Longmont, Colo. I'm now employed at Colorado Springs doing custom masonry work. at present I am still single. As you already know I am an active member of Jehovah's witnesses" at the South Unit in Colorado Springs.

Yours Truly
Raymond Gonzales Jr.

over

[redacted]

[fol. 25a]

I'm sorry for the delay in getting this information to you. I'll be glad to furnish you with any other information you might need.

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
451 INDIANA AVENUE NORTHWEST
WASHINGTON 25, D. C.

IN REPLYING ADDRESS
THE DIRECTOR OF SELECTIVE SERVICE
AND REFER TO NO.

April 1, 1955

OPERATIONS BULLETIN NO. 123

SUBJECT: PROCESSING OF CERTAIN CONSCIENTIOUS OBJECTOR CASES WHICH ARE AFFECTED BY RECENT SUPREME COURT DECISIONS

1. On March 14, 1955, in deciding cases involving the denial of claims of conscientious objection, the Supreme Court of the United States held (a) that a claim of conscientious objection is not defeated solely because a registrant is willing to participate in a spiritual war or to use force in self-defense or in defense of his ministry, Kingdom interests, and fellow brethren; (b) that upon referral of a claim of conscientious objection to the Department of Justice for its recommendation, the Department must furnish the registrant with a fair summary of adverse information in the Federal Bureau of Investigation report; and (c) that when the Department makes its recommendation to the appeal board, a copy must also be furnished to the registrant, and he must be afforded an opportunity to reply to the appeal board. These rulings by the Supreme Court must be applied immediately to all appropriate cases.

2. No appeals, involving claims of conscientious objection which have been referred to the Department of Justice, shall be decided by any appeal board until the registrant has been furnished a copy of the recommendation of the Department of Justice and afforded an opportunity to file a reply in writing with the appeal board. In each such case which is now pending at an appeal board or is hereafter returned to an appeal board by the Department of Justice, the appeal board shall mail to the registrant a copy of the recommendation of the Department of Justice enclosed with a letter informing the registrant that, within thirty days after the date of such mailing, he may file a written reply with the appeal board concerning the recommendation of the Department. A copy of the letter shall be placed in the registrant's cover sheet. The recommendation of the Department of Justice is forwarded to the appeal board in an original and one copy. The copy should be mailed to the registrant. No such case shall be decided

2.

by an appeal board until the reply of the registrant has been received or the thirty-day period afforded the registrant to make such reply has expired, whichever occurs first. In making its decision, the appeal board shall consider any reply received from the registrant.

3. (a) In the cases of many registrants whose cover sheets are now at local boards, claims of conscientious objection have already been denied by appeal boards or the President after referrals to the Department of Justice but the registrants have not had an opportunity under the new required procedure to file written replies to the recommendations of the Department of Justice with the appeal boards before the decision of their cases. It is necessary that such cases be reopened by the local boards and the classifications considered anew.

(b) Under the provisions of section 1625.3 (a) of the Selective Service Regulations, local boards are requested to reopen and consider anew the classification (1) of every registrant presently in Class I-A whose case involves a claim of conscientious objection which has been denied by the appeal board or the President after referral to the Department of Justice, and (2) of every registrant presently in Class I-A-O who claimed conscientious objection to both combatant and noncombatant military service and whose claim has been denied in part by the appeal board or the President after referral to the Department of Justice.

(c) It will not be necessary to reopen and consider anew the classification of any registrant whose entire claim of conscientious objection has been granted.

Lewis B. Hershey

DIRECTOR

[fol. 32a]

July 25, 1956

State Director
Selective Service
464 Post Office Building
Denver 2, Colorado

Re: Raymond Gonzales, Jr
5-9-34-58

Dear Sir:

As you recall our above-named registrant refused induction on June 11th, 1956, due to his belief as a Jehovah Witness.

At our Board meeting on July 20th, 1956, his case was re-opened and classification considered anew. His order to Report for Induction was cancelled. He was then classified I-A. On July 25th, 1956, we mailed a letter to him cancelling his induction and enclosing his classification card of I-A.

If at the end of his ten day right of appeal and he has not contacted our office should we return his file to your office for further action.

Very truly yours,

Local Board No. 9
Boulder, Colorado

By____________________
Bessie B. Payne, Clerk.

COLORADO STATE HEADQUARTERS
SELECTIVE SERVICE SYSTEM
POST OFFICE BLDG., 18TH AT STOUT STREET
DENVER 2, COLORADO

OFFICE OF THE
STATE DIRECTOR

IN REPLY, ADDRESS:
STATE DIRECTOR OF SELECTIVE SERVICE
REFER TO NO.

400.

July 27, 1956

Local Board No. 9
Selective Service System
1733 - 11th Street
Boulder, Colorado

Re: Raymond GONZALES, Jr.
SS No. 5-9-34-58

Gentlemen:

In reply to your letter of July 25, 1956, we will advise you that if the registrant fails to exercise his right of appeal within the 10 day appeal period, you should order him to report for induction in the usual manner.

If the registrant again fails, or refuses to submit to induction, the file will then be forwarded to State Headquarters for transmittal to the Director of Selective Service as provided in Paragraph 9 of Local Board Memorandum No. 14.

If you have further questions regarding this case do not hesitate to again write us.

Very truly yours,

Henry O. Lail
HENRY O. LAIL
Deputy State Director

HOL/sc

[fol. 34]

August 6, 1956

Mr. Raymond Gonzales, Jr
Box 285, West End Station
Colorado Springs, Colorado

Dear Sir: Re: 5-9-34-58

Your letter of August 3, 1956, requesting personal appearance before the local board was received today. Your request for such appearance has been granted and you will be given an appointment on Friday, August 17th, 1956, at 1:30 p.m.

Very truly yours,

Local Board No. 9
Boulder, Colorado

By______________________
Bessie B. Payne, Clerk.

SELECTIVE SERVICE SYSTEM

No.
County

AUG 17 1956

(LOCAL BOARD STAMP)

August 17th, 1956

STATEMENTS MADE AT THE PERSONAL APPEARANCE OF
RAYMOND GONZALES, Jr., 5-9-34-58

When asked by the members of Local Board No. 9, Boulder, Colorado, if he thought he was entitled to any other classification than that of I-A, Mr. Gonzales replied, "I am a minister and as such should be classified 4-D. Also, a minister is automatically classified as a conscientious objector." The board replied that this statement was in error.

Mr. Gonzales then went on to say that he had always made the claim that he was a minister even at the very beginning of his registration. He still made the statement that if I am a minister I am a conscientious objector.

When asked if he would participate in the conscientious objector work program, he stated definitely not.

Mr. Gonzales stated "I am a regular minister as defined under section 16 G part II of the laws and regulations set out by Selective Service Act of 1948. At present I am devoting an average of 100 hours a month to actual preaching publicly and from house to house, and an additional 50-75 hours in preparation for ministerial duties such as; preparation for home bible studies; calling back on good-will persons; attending congregational meetings, as well as training students to become ministers. I also serve as Stock Servant for the local congregation. As you perhaps already know that the Selective Service National Headquarters has determined that Jehovah's Witnesses and the Watchtower Bible and Tract Society constitues a recognised religious organisation and that all Jehovah's Witnesses who are regularly and customarily teaching and preaching the doctrines and principles of the Bible as advocated by Jehovah's Witnesses as a vocation and not incidentally are entitled to exemption as ministers of religion. These are some of the reasons I request a 4-D classification, so I would like for you to further consider my case as a minister of the gospel or would like to appear in person before the local board members for further consideration or discussion in regard to my case.

When asked by the board if he had any further information to submit, he stated he submitted no new evidence except what was stated above, but would like to submit a certificate of marriage as the only new matter to be brought before the board.

[fol. 36a]

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

Address Reply to the
Division Indicated
and Refer to Initials and Number

[illegible]

Chairman, Appeal Board for the
State of Colorado
Selective Service System
Room 464 Post Office Building
Denver 2, Colorado

Re: Raymond-Gonzales, Jr.
Conscientious Objector

Dear Sir:

As required by section 6(j) of the Universal Military Training and Service Act, as amended, an inquiry was made by the Department of Justice in the above-mentioned case and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Mr. Maurice A. Evenson, a Hearing Officer for the Department of Justice.

The information obtained from the supplemental inquiry and considered by the Department of Justice in arriving at its recommendation is contained in the Resume of the Supplemental Inquiry attached hereto and made a part hereof.

Registrant is 23 years of age, married, employed as a brick mason and has completed eight years of schooling. He is a member of the Jehovah's Witnesses, and has claimed exemption from both combatant and noncombatant training and service.

In His SSS Form No. 150, registrant indicated that, according to God's Word, Jehovah's Witnesses do not fight for worldly kingdoms and do not fight against flesh and blood, but against wicked spirit forces in heavenly places, with the sword of the spirit which is God's Word the Bible. He explained that he received the training and acquired the belief which is the basis of his claim through religious family training and congregational meetings of Jehovah's Witnesses, through Watchtower Bible and Tract Society publications and the Bible. He listed the leader of his congregation as the individual upon whom he relies most for his religious guidance, and also indicated that he relies upon the Watchtower Bible and Tract Society. With respect to his belief in the use of

[fol. 37]

-2-

force, registrant stated: "The only time I would use force to the extent of killing if necessary would be to protect my immediate family from danger. If someone was trying to kill them. If I was out preaching and someone would molest me I would not fight if I could leave as Christ did. ..."

On August 17, 1956, when he personally appeared before his local board, registrant stated that he was then devoting an average of 100 hours a month to actual preaching publicly and from house to house, and an additional 50 to 75 hours in preparation for ministerial duties, such as preparation for home Bible studies, calling back on good will persons, attending congregational meetings and training students to become ministers. He also indicated that he served as Stock Servant for his local congregation.

The Resume of the Supplemental Inquiry reflects the Congregational Servant of the group with which registrant is affiliated related that registrant spends from 20 to 25 hours each week in church activity or preparation for study groups. This person made available registrant's Publisher's record which he described as registrant's record of activity and preaching to the public. This record reveals that for the period from September 1954 through September 1956, registrant devoted an average of approximately six and one-half hours per month to preaching to the public.

Registrant personally appeared before the Hearing Officer on January 7, 1957, at Pueblo, Colorado, and was accompanied by two friends who are also members of the Jehovah's Witnesses. He advised the Hearing Officer that both of his parents and his wife are members of this organization, and that he was reared in the Jehovah's Witnesses faith. The Hearing Officer's report reflects that registrant holds no official position in the Jehovah's Witnesses, but is merely a Congregation Publisher, and that he readily quoted Biblical references in support of his claim. When questioned as to his stand under circumstances calling for self defense, registrant made the statement that he is not opposed to all violence but believes that he can fight in self defense. He quoted a Biblical passage in support of his belief that he could fight in defense of himself, his brethren, his sons, daughters, wife and home.

The registrant stated that the Jehovah's Witnesses, as a church, do not take a stand one way or another as to military service. He said this is left to the individual, and added that he has come to his own decision as a result of his study of the Bible. With reference to noncombatant service he stated that this would be helping along the military and that he was also opposed to this form of service. He said that he does not smoke and does not drink except for an occasional can of beer, and that he has never been in trouble with the law. He mentioned that the charge that had been brought against him relating to improper advances to a woman was false. The Hearing Officer noted that this is substantiated by the information contained in the Resume of the Supplemental Inquiry. Both of registrant's witnesses indicated that they believe he is sincere in his religious beliefs and in his conscientious objector claim.

The Hearing Officer reported that registrant gave the appearance of being sincere and firm in his beliefs and that he appeared to be well versed in the scriptures. He found that registrant's objections are based upon his religious training and belief but concluded that he is not opposed to participation in war in any form. He further concluded that registrant was opposed to combatant training and service but not opposed to noncombatant training and service. he, therefore, recommended that registrant be exempt from combatant training and service only.

It appears that the Hearing Officer's findings and recommendation in the captioned matter are very similar to the circumstances in the case of *U. S. v. Pelvea*, U.S. District Court, Northern District of Ohio, Eastern Division, March 1 , 1950 (unreported), in which the Court held that there was no basis in fact for the I-A-O classification. In that case the Court said, *inter alia*:

> "I think it would have been more difficult for the Court to find the act of the Board was without any basis in fact if the Board had classified this man as I-A rather than I-A-O. They accepted the defendant's professions of sincere and conscientious objections on the religious grounds as being truthful, but they attempted, and in my opinion without any basis in fact, to assert that while he was sincere and conscientious, that sincerity and conscientiousness extended only to his active aggressive participation in military service and that he was not sincere in his statements that he was opposed to war and participation in war in all its forms."

[fol. 38]

- 2 -

[illegible] the [illegible] and [illegible] practice of the Department in cases of this kind, it a[illegible] no basis in fact to support a classification [illegible] respect to the above named registrant.

On the other hand the registrant's claim as to [illegible] his religious activities is so grossly exaggerated, if we are to believe the official records of his religious organization, as [illegible] in the record and recapitulated above, as to cast doubt upon his veracity and, consequently, upon his sincerity and good faith. Therefore, with the record [illegible] the Hearing Officer's recommendation, the Department of Justice finds that the registrant's [illegible] sustained. Accordingly, it is recommended to your board that registrant's claim be not sustained.

The Selective Service Cover Sheet in the above case is returned herewith.

Sincerely,

T. Oscar Smith

T. Oscar Smith
Chief, Conscientious Objector Section

[illegible]

Re: Raymond Gonzales, Jr.

Conscientious-objector Claimant

NOTICE

A resumé of prior investigative reports was furnished the registrant in connection with a hearing held by a Department of Justice Hearing Officer on October 20, 1953. The original of said resumé was made a part of the registrant's Selective Service file and is incorporated herein by reference.

Registrant has been employed on a steady basis as a brick mason since April 1, 1955. He is regarded as an excellent worker, completely reliable, dependable and of excellent morals, character and associates. It was reported that he was married on July 7, 1956.

Registrant's employer, acquaintances, neighbors and religious associates all spoke favorably concerning registrant's character and reputation, conduct and morals. These persons reported that registrant is very active in the church affairs of the Jehovah's Witnesses and is very devoted to his religious beliefs. They said he lives up to the teachings of the church and is considered to be sincere in his religious beliefs and in his conscientious-objector claim.

The Congregational Servant of the group the registrant is affiliated with added that registrant spends 20 to 25 hours each week in church activity or preparation for study groups. He made available registrant's Publisher's record which he described as registrant's record of activity in preaching to the public. This record reflects that for the period from September 1954 through September 1956, registrant has devoted an average of approximately six and one-half hours per month to preaching to the public. He was baptized in November 1948.

-2-

Registrant has a satisfactory credit rating. The records of the Colorado Springs Police Department reflect that registrant was fingerprinted on April 13, 1956, and photographed on April 14, 1956. Since there was no arrest card made and no other additional information concerning the reason for registrant having been fingerprinted and photographed, the registrant was interviewed to determine the reason therefor. He related that on the evening of April 13, 1956, he attended a meeting at the Kingdom Hall and following the meeting he took his girl friend, now his wife, to her home, and after leaving her house he continued on his way home. He explained that he missed a turn on a certain street and shortly after he got back on the right street he was stopped by police officers and was told a woman claimed he had made obscene remarks to her and had tried to pick her up. He said he told the officers that he had not been in the area designated by the woman, but was nevertheless asked to follow the police car to the police station where he was fingerprinted and photographed. He indicated that a short time later he was released as no charges were filed against him and he denied that he was identical to the individual who allegedly tried to "pick up" a woman that evening. The two police officers who stopped the registrant furnished substantially the same information. They said they were "flagged" by a young wench standing on a corner, who advised them that a young fellow had driven past her a few minutes earlier and made obscene remarks to her and asked her if she would like to take a ride. She said she refused and that the man drove around the block, parked his car, got out and walked over to her and allegedly told her that he would like to take her home but would like to take her somewhere else first. She said she again refused and the individual drove on. The officers indicated that while they were talking to the woman a car was noted turning on the street and the woman pointed the car out saying she thought that was the car in question. When registrant was stopped he strongly denied trying to "pick up" a woman or even being in the area where the woman had been standing. The woman advised that she was sure that the car she pointed out was the car involved but emphatically refused to sign a complaint against the registrant. Subsequently registrant was released as

- 2 -

No charges were filed against him. A lieutenant in the Colorado Springs Police Department recalled that registrant did not seem to be the type of person who would make obscene remarks to women and he also said he was possibly not the individual who made the remarks. He felt at the time that the woman making the complaint was not certain of the identity of the registrant or she would have been willing to sign a complaint against him. As above indicated no charges were filed against the registrant in connection with this incident and he was released.

The clerk of the Watchtower Bible and Tract Society at Brooklyn, New York, advised that a re-check of the records of this organization from the information available failed to reflect any additional information pertaining to the registrant other than that previously furnished in September 1953. He said the registrant is not on the current Pioneer list.

Prepared: November 2 , 1956

[fol. 40a]

April 23, 1957
Raymond Gonzales, Jr.
Selective Service No. 5-[illegible]-34-

Local Board No. 9
Boulder County
1933- 11th Street
Boulder, Colorado

Dear Sir;
I would like to submit my new address as of now,
General Delivery
Farmington, New Mexico
Residence: Lee's Trailer Court
Farmington, New Mexico
Previous address : Box 285 West End Station
Colorado Springs, Colorado

Yours Truly,

Raymond Gonzales Jr.

APR 29 1957

April 23, 1957
Raymond Gonzales, Jr.
General Delivery
Farmington, New Mexico
Selective Service No. 5-9-34-58
Conscientious Objector

Appeal Board, State of Colorado
Post office Building 18th Stout Street
Denver 2, Colorado

Dear Sir;

This is in answer to your letter of April 4, 1957, in which I also received a copy of the October 20, 1953 Supplemental inquiry. Enclosed was also a copy of the recommendation or information submitted by the hearing officer, on the appearance I made on the 7th of January 1957, at Pueblo, Colorado. At this time I would like to call your attention to the top of page 3 of the report dated March 21, 1957 signed T. Oscar Smith, wherein is found the statement in effect saying that I am opposed to both combatant and noncombatant service. In the following paragraph the statement is made that I am not opposed to noncombatant service, I would like to sustain the former. (I am opposed to both combatant and noncombatant duty.)

On page two paragraph one I find the statement made that on August 17,1956 I the registrant told the local board I was then devoting an average of 100 hours a month to preaching publicly. I would like to state that I did not at such a time make such a statement or any statement implicating the same. The only time I submitted such information was when I was pioneering that was in the period of October 1, 1952 to April 16, 1953. The statement is also found (He also indicated that he served as Stock Servant for his Local congergation.) On the 17 of August 1956 when I appeared before the Local Board at Boulder, Colorado, I was then associated with the South Unit of Jehovah's Witnesses at Colorado Springs , Colorado. I was not then serving as Stock Servant for the Local congergation. I did serve as Stock Servant for the Longmont, Colorado congergation; of which the records stands. I would like to make it plain that I in no manner ever exaggerated my report concerning my activities. The reason being more than just my respect for mere man, but as a Christian and Bible Student I realise I stand before the Higher Authorities Jehovah God and Jesus Christ, I am also fully aware of the consequences to liars as stated at Proverbs 6:16,17,19 showing God hates a lying tongue. I also realize that for one to lie would make void his Christian conduct and worship. So please consider the information here submitted, I am sure the record stands behind it all.

I would like to submit my new address;
General Delivery
Farmington, New Mexico
Residence; Lee's Trailer Court, Farmington, New Mexico
Previous address:
Box 285 West 2nd Station
Colorado Springs, Colorado

Yours Truly,
Raymond Gonzales Jr

S.S. No. 5-9-34-58
June 11, 1957
Raymond Gonzales Jr.

Local Board No. 9
1933- 11th Street
Boulder, Colorado

Dear Sir;

In acknowledgement of your letter of June 3, I am now writing to let you know that my wife is pregnant and would like to know if that would change my draft stat for the present. If not perhaps you would allow me a stay until the baby is born. Thank you.

Sincerly Yours,

Raymond Gonzales Jr.

Raymond Gonzales

JUN 13 1957

June 14, 1957

Mr. Raymond Gonzales Jr.
General Delivery
Farmington, New Mexico

Dear Sir:

We received your letter of June 11 with the doctor's certificate verifying your wife's pregnancy.

We cannot postpone your induction due to the following regulation: " If a registrant fails to notify his local board of his status as a father or expectant fatherhood until after the local board has mailed him an order to report for induction, it will be too late to be given consideration by his local board and he will be inducted."

Your order to report for induction on June 24th, 1957 is still in effect.

Very truly yours,

Local Board No. 9
Boulder, Colorado

Clerk

[fol. 45a]

HEADQUARTERS
U. S. ARMY RECRUITING MAIN STATION
101 Old Custom House, 16th & Arapahoe Sts
Denver 2, Colorado

JUN 28 1957

AIBIS 27 June 1957

SUBJECT: Refusal to submit to induction into the Armed Services of the United States

TO: U. S. Attorney
District of Colorado
Post Office Building
Denver, Colorado

1. You are hereby notified that on 24 June 1957, one Raymond Gonzales, Jr., Box 130, Reed Avenue, Longmont, Colorado, refused to submit to induction into the Armed Forces of the United States. Mr. Gonzales was forwarded to this Induction Station by Local Board No. 9, Boulder, Colorado, and his Selective Service Number is 5 9 34 58.

2. Facts of the refusal to submit to induction are as follows:

On 24 June 1957, Raymond Gonzales, Jr. was assembled with the rest of the inductees for the induction ceremony. When his name and service were called, Mr. Gonzales refused to take the required one step forward. He was removed from the group and subsequently informed of the consequences of such action under law. He was again given the opportunity to take the necessary step forward after his name and service were called; he again refused. Mr. Gonzales submitted a written statement, copy of which is attached. Upon completion of the induction ceremony, and after his second refusal, Mr. Gonzales was allowed to leave this station.

3. Witnesses to this refusal to submit to induction have attested by signature below:

James R Arnal
JAMES R ARNAL
1st Lt., Inf
Assistant Adjutant

John H Hess
JOHN H HESS
SFC, RAS
Chief Clerk

George T. Cribb
GEORGE T CRIBB
Capt, USMC
Acting Induction Officer

1 Incl
Statement of Mr. Gonzales
Copies furnished:
Hqs, State Sel Serv System
P O Bldg, Denver, Colo.
LB No. 9, Boulder, Colo.

[fol. 46]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ORDER OF SUBMISSION—May 25, 1959 (omitted in printing).

[fol. 47]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OPINION—July 27, 1959

Hayden C. Covington, (W. H. Erickson was with him on the brief) for Appellant.

Jack K. Anderson, Assistant United States Attorney, (Donald E. Kelley, United States Attorney; James C. Perrill, Assistant United States Attorney; and Daniel O. Omer, Col., JAGC, General Counsel, Selective Service System, were with him on the brief) for Appellee.

Before Bratton, Chief Judge, and Huxman and Lewis, United States Circuit Judges.

HUXMAN, Circuit Judge.

[fol. 48] Appellant, Raymond Gonzales, Jr., was convicted of violating the Universal Military Training and Service Act, as amended, in that he knowingly and wilfully refused to submit to induction into the Military Forces of the United States. A somewhat detailed statement of the facts at the outset may be helpful in an orderly consideration of the questions presented for review.

Appellant is a male citizen of the United States and was subject to registration under the Universal Military Training and Service Act, as amended. He registered with Local Board Number 9, at Boulder, Colorado. In due course he was processed, was classified 1-A on November 13, 1952, and was duly notified of such classification. On receipt of his notice he requested a personal appearance, stating, in a letter dated November 22, 1952, that he was a minister devoting 100 hours a month to actual preaching and an additional 50 to 75 hours in preparation of such work. He attached four affidavits stating that he was engaged in full-time ministerial work.

On December 4, 1952, the Local Board classified him as a conscientious objector and placed him in Class 1-O. Thereafter, on June 30, 1953, the Local Board changed his classification to 1-A. Upon receipt of notice of this change, he requested a personal appearance before the Board and [fol. 49] appended a letter appealing his classification. He was granted a hearing August 13, 1953. The Board, on its record, noted his appearance, granted him the right to appeal his 1-A classification, and entered a statement that it had reviewed his classification, reconsidered the information contained in his SSS Form 150, wherein it was stated that he believed in force to the extent that he would defend his person, his church and his home by killing, if necessary. The Board concluded that because of this, he should not be classified as a conscientious objector.

The Selective Service file was referred to the Justice Department, an investigation was conducted by the F.B.I., and its report, together with the file and other papers, was forwarded to Hearing Officer Fred M. Mazzulla. He held a hearing in Denver which appellant attended. The Hearing Officer had the F.B.I. files and read them. He reported that appellant was a "sincere member of Jehovah's Witnesses and a believer in its tenets, but the teaching of this sect and the beliefs expressed by this registrant do not establish to the satisfaction of this Hearing Officer that the registrant is opposed to war in any form." The officer recommended that appellant's claim be not sustained. On February 1, 1954, T. Oscar Smith, Special Assistant to the Attorney General, in a letter to the Chairman of the Appeal Board, reviewed appellant's record, quoted from the Hearing Officer's report, and stated, "After consideration of the [fol. 50] entire file and record, the Department of Justice finds that the registrant's objections to combatant and noncombatant service are not sustained. It is, therefore, recommended to your Board that registrant's claim for exemption from both combatant and noncombatant training and service be not sustained."

The Appeal Board classified appellant 1-A on April 1, 1954, and on return of the file to the Local Board, the Local Board again classified appellant 1-A, and on May 23, 1956, ordered him to report for induction on June 11, 1956. Notwithstanding his refusal to report, he was not prosecuted. His order to report was cancelled and his case was reopened and he was again classified 1-A. His request for a personal hearing was granted and a personal hearing was held August 17, 1956. He was again classified 1-A. His file was again forwarded to the Appeal Board and was again forwarded to the Justice Department for inquiry and hearing. The entire file, including the F.B.I. report, was forwarded to Hearing Officer Maurice Evensen. He sent a resume of the F.B.I. inquiry to appellant before the scheduled hearing. Appellant again attended the hearing. Hearing Officer Evensen concluded his report and reported that registrant was opposed to combatant training and service but concluded that registrant was not opposed to noncombatant training and service. He, there- [fol. 51] fore, recommended that registrant be exempt from combatant training and service only. Upon receipt of the Hearing Officer's report, the Justice Department reviewed it. The Department did not agree with the conclusion of the Hearing Officer.

In a letter to the Appeal Board dated March 21, 1957, the Justice Department recommended that appellant's claim be not sustained. It pointed out that while, as shown by the Board's records, appellant claimed that he was still devoting 100 hours per month to actual preaching, the report of the F.B.I., made a part of the recommendation, showed that he devoted only 20 to 25 hours per month to church activities and only approximately six and one-half hours per month to actual preaching. The Justice Department concluded by stating, "On the other hand the registrant's claim as to the amount of his religious activities is so highly exaggerated, if we are to believe the official records of his religious organization as reported in the resume and recapitulated above, as to cast doubt upon his veracity and, consequently, upon his sincerity and good faith. Therefore, with due respect to the Hearing Officer's recommendation, the Department of Justice finds that the registrant's claim is not sustained. Accordingly, it is recommended to the Board that registrant's claim be not sustained." A copy of this recommendation was mailed by the Appeal Board to appellant. He answered it and stated that he [fol. 52] did not inform the Local Board on August 17, 1956, as contended by the recommendation, that he was devoting 100 hours per month to preaching; that the only time he submitted such information was when he was pioneering, which was in the period of October 1, 1952 to April 16, 1953. On May 2, 1957, the State Appeal Board unanimously concurred in the recommendation of the Justice Department and classified appellant 1-A. Upon return of the file to the Local Board, he was notified of such classification. Thereafter, a new order to report was issued which appellant again ignored and this prosecution followed.

What occurred at the hearing on August 17, 1956, is in a large measure the crux of this case. It is conceded that at that time appellant was not engaged as a full-time minister and was not devoting approximately 100 hours per month to preaching and 50 to 75 hours additional in preparation for preaching. If, in fact, he told the Local Board at that time, as is recorded on its record, that he was so engaged, he was guilty of a false statement which would support a conclusion that he had not painted a complete or accurate picture, and would warrant the further conclusion that he was not sincere in his claim that he was a conscientious objector opposed to all forms of participation in combatant and noncombatant military activity[1] and would support the 1-A classification he received.

[fol. 53] It is strenuously urged that appellant did not on August 17, 1956, state to the Board that he was engaged as a full-time minister, devoting 100 hours per month to preaching and 50 to 75 hours per month in preparation for such work. The Board did, at that time, record on its record of his case that that is what he stated. The contention is made that this record was made without receiving such testimony from appellant. In support thereof, it is pointed out that the fourth paragraph of the Board's report of August 17, 1956, is in the identical language of the fourth paragraph of appellant's letter of November 22, 1952, in which he did state that he was, at that time, devoting 100 hours per month to actual preaching and from 50 to 75 additional hours in preparation for such work. But it does not follow from this that no such statement was made by him, in substance, at the August 17 meeting. Even if we assume that the Board copied the fourth paragraph of appellant's letter of November 22, it would not impeach its record if, in fact, he told the Board substantially the same thing he stated in his letter of November 22.

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[1] *Dickinson* v. *U. S.*, 346 U.S. 389; *Witmer* v. *U.S.*, 348 U.S. 375.

When reviewing a classification made by a Board, a court is limited in its jurisdiction to ascertain whether there is no evidence to sustain the classification. The court may not weigh the evidence to determine whether the clas- [fol. 54] sification was justified.[2]

The duty rested upon appellant to make a full disclosure to the Board of all relevant facts affecting his status on August 17, 1956. It is conceded that he did not, at that time, tell the Board of his change of status from that claimed in his letter of November 22. His only answer is that he was not asked, but that is not sufficient to discharge the duty resting upon him to make a full disclosure of his status at that time. While he claims that he was denied the opportunity to adduce additional evidence, there is testimony in the record which would support a contrary conclusion.

The law is well settled that the recommendations of the Justice Department to the Board as to a registrant's classification is just that, and is not binding on the Board. No attempt will be made to analyze all the cases cited by appellant to sustain his contention that the recommendation by the Justice Department in this case requires a reversal. Among these cases are U. S. v. Close, 215 F.2d 439; Hinkle v. U. S., 216 F.2d 8; and Shepherd v. U. S., 217 F.2d 942. In the Close case, the court held that an F.B.I. report reporting evidence with people whose views varied as to the sincerity of registrant's claim for exemption as a conscientious objector was not proper evidentiary basis upon which

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[2] *Dickinson* v. *U. S.*, 346 U.S. 389.

[fol. 55] the Local Board could deny exemption. In the Hinkle case, the Board acted upon the advice of the Justice Department that the registrant could not claim exemption because he stated that he would kill in self defense in the protection of his home and because of his belief in the justification of theocratic war. The Shepherd case was also decided upon erroneous legal advice given by the Justice Department. An examination of all the remaining cases shows them clearly distinguishable upon the facts.

In this case, the Justice Department merely advised that if the official record of the Board was to be believed, then his claim to ministerial exemption was so exaggerated as to cast doubt upon his sincerity, and, therefore, it recommended that the claim be not sustained. This left to the Board the decision whether the claim as to ministerial activities was exaggerated, and it resolved that question against appellant. We think it is clear in the record that the Board treated the communication by the Justice Department merely as its recommendation, considered it in light of the record of the Local Board, concluded that appellant had been guilty of gross misrepresentation of his ministerial status at the hearing before the Local Board on August 17, 1956, that because of such misrepresentation, he was not sincere in his claim that he was opposed to participation in war and in activities furthering the war effort, and based on those conclusions, classified him 1-A. [fol. 56] It is our further view that the record is not without evidence to support these conclusions.

What has been said, disposes of the second assignment of error that the final 1-A classification was arbitrary and capricious because it was without basis in fact. What has been said requires an affirmance of the judgment unless there was a denial of procedural due process under the Act or Regulations promulgated thereunder, or denial of due process under the Fifth Amendment.

It is contended that the Department of Justice denied appellant due process of law in failing to supply to the Appeal Board and to appellant a copy of each Hearing Officer's report. With respect to the hearing held before Officer Mazzula, it is sufficient to say that appellant's final classification was not based on that report or on the investigation of the F.B.I. That classification was set aside. When he appealed a second time, a second investigation was made by the F.B.I. Its report was furnished to Hearing Officer Evensen. He made available to appellant a resume of that report. In U. S. v. Nugent, 346 U.S. 1, the Supreme Court held that a registrant was not entitled to the F.B.I. report for inspection; and that all he was entitled to was a fair resume of any adverse evidence in the investigator's report.[3] In Bouziden v. U. S., 251 F.2d 728, [fol. 57] we stated, "The fact that the Justice Department's recommendation forms a part of the record and the complete file is not before the Board of Appeals, does not make the board's action unlawful (since this is a determinative procedure set by statute) if there is a basis in fact to be found in the whole record."

Aside from that, the failure of the Justice Department to send the complete F.B.I. file to the Appeal Board, could not have misled it to appellant's prejudice as to the basis of the Department's recommendation that appellant be classified 1-A. Its recommendation was based on the sole ground that appellant's statement at the hearing of August 7, 1956, that he was spending 100 hours a month in preaching and 50 to 75 hours additional in preparation for such work would raise a serious question as to his sincerity and would justify a 1-A classification. The only part of the F.B.I. report relied upon by the Justice Department or alluded to in support of its recommendation to the Board was that part which reported what the church record showed as to the amount of time spent by appellant on August 17th, 1956, in ministerial work, or in preparation of such work, and there is no claim that the F.B.I. did not correctly report these facts.

It is further contended that appellant was denied a fair hearing guaranteed by the Fifth Amendment when the court [fol. 58] refused to compel the production of the F.B.I. reports, which were shown to be material and relevant, because appellant needed them to prove the defenses urged by him that he was denied procedural due process before the Appeal Board by the failure of the Justice Department to make an accurate summary of the F.B.I. reports, and thereby withheld from the Appeal Board evidence favorable to his conscientious objector's claim. If a defendant in a criminal case may compel the production of the F.B.I. reports which are made for the benefit of the Justice Department by merely stating that the Justice Department failed to make a fair summary of the evidence in its recommendation to the Board, then the pronouncement by the courts in cases such as U. S. v. Nugent, 346 U.S. 1; Bouziden v. U. S., 251 F.2d 728; and Stasevic v. U. S., 117 F.Supp. 371, to the contrary, become meaningless. These cases all point out why a defendant is not entitled to the production of these reports and no effort will be made to restate what has been said therein.

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[3] Hearing Officer Evensen furnished appellant with a resume of the F.B.I. report, and there is no showing in the record that it was not a fair resume.

As was stated at the beginning, the crux of this case is whether at the August 17, 1956 hearing before the Local Board, appellant represented he was still devoting 100 hours a month to preaching and 50 to 75 hours additional in preparation of such work, when the fact is that he was only devoting a few hours per month to such work. The [fol. 59] finding that he made this false representation finds support in the record and sustains the conclusion that he was not sincere in claiming to be a conscientious objector, and that, in turn, sustains the 1-A classification he received. The record also supports the further conclusion that he was afforded an opportunity at the hearing before the Local Board on August 17, 1956, to make a full disclosure of his status and present any evidence tending to support his claim. This opportunity was also afforded him before the Hearing Officer. It is no defense to say he was not asked about his change in ministerial status. The Board and the Hearing Officer were not there to develop anything. They were there to afford him an opportunity to present anything he had to offer in support of his claim. This constituted due process under the Act and its Regulations, as well as under the Fifth Amendment.

Affirmed.

[fol. 60]

IN THE UNITED STATES COURT OF APPEALS

JUDGMENT—July 27, 1959

Thirty-ninth Day, May Term, Monday, July 27th, 1959.

Before Honorable Sam G. Bratton, Chief Judge, Honorable Walter A. Huxman and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Raymond Gonzales, Jr., appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

By order of August 6, 1959, the mandate of the United States Court of Appeals was stayed for a period of thirty days from that day under provision of paragraph 3 of rule 28 of said court.

[fol. 61] Clerk's Certificate (omitted in printing).

[fol. 62]

SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 25th, 1959.

Charles E. Whittaker, Associate Justice of the Supreme Court of the United States.

Dated this 24th day of August, 1959.

[fol. 63]

SUPREME COURT OF THE UNITED STATES

No. 416—October Term, 1959

RAYMOND GONZALES, JR., Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—Filed November 23, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

ILE COPY

Office Supreme Court, U.S.
FILED
SEP 21 1959
JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1959

No. 416

RAYMOND GONZALES, JR., Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the
United States Court of Appeals
For the Tenth Circuit

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Supreme Court of the United States

October Term, 1959

No.

RAYMOND GONZALES, JR., Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

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To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue in this case to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of the United States District Court for the District of Colorado convicting the petitioner for a violation of the Universal Military Training and Service Act.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed, *infra*, pages 13 to 21, as Appendix A. There is an unreported opinion of the district court. [R. 111-115]

JURISDICTION

The judgment of the Court of Appeals was entered on July 27, 1959. See Appendix B, *infra,* page 22. The time for filing this petition was extended to September 25, 1959, by an order made by Mr. Justice Whittaker on August 24, 1959. See Appendix C, *infra,* page 23.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P. Title 18, Section 3231, U.S.C. confers jurisdiction on the trial court.

QUESTIONS PRESENTED

I.

Whether the Chief of the Conscientious Objector Section of the Department of Justice and the local board denied the petitioner procedural due process of law before the appeal board because of the misleading and false statements made by the Department of Justice and the local board that the petitioner misrepresented that he was devoting 100 hours per month to preaching and 50 to 75 hours per month to preparation for ministerial duties, when as a matter of fact he was devoting only 6½ hours to preaching and 20 to 25 hours per month to preparation.

II.

Whether the denial of the conscientious objector status was without basis in fact, thus making the final I-A classification by the appeal board arbitrary and capricious.

III.

Whether the Department of Justice denied petitioner procedural due process of law in failing to supply to the appeal board and to the petitioner a copy of the hearing officer's report by following the mandate of Section 1626.25 of the Selective Service Regulations (32 C.F.R. § 1626.25)

which is void because in conflict with the Universal Military Training and Service Act which, as enacted and reenacted, approved and made a part of the law the ten-year-old regulation providing for the inclusion of the report in the Selective Service file.

IV.

Whether the petitioner was denied constitutional rights to a full and fair hearing guaranteed by the Fifth Amendment in the district court when the trial court refused to compel the production of the formal typewritten legally required report of the hearing officer to the Department of Justice at Washington, D. C., concerning the hearing conducted by him, and in quashing the subpoena *duces tecum* calling for the production of such document, all of which was material and relevant.

V.

Whether the petitioner was denied constitutional rights to a full and fair hearing guaranteed by the Fifth Amendment in the district court when the trial court refused to compel the production of the original F.B.I. reports and quashed the subpoenas calling for the production of such reports which were shown to be material and relevant because petitioner needed them to prove the defenses urged by him that he was denied procedural due process of law before the appeal board by the failure of the Department of Justice to make an accurate summary of the original F.B.I. reports and thereby withheld from the appeal board evidence favorable to his conscientious objector claim.

STATUTES AND REGULATIONS INVOLVED

Section 6 (j) of the Universal Military Training and Service Act (62 Stat. 604, 612, 622; 65 Stat. 75, 86 (50 U. S. C. App. § 456 (j))) is involved here. The pertinent part reads as follows:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * * Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal ~~board shall~~ refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * * If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *"

Section 1 (c) of the Universal Military Training and Service Act (50 U. S. C. App. § 451 (c)) provides:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1 (a) 65 Stat. 75.

Sections 1622.11, 1622.14, 1626.25 (a), 1626.25 (b) and 1626.25 (c) of the Selective Service Regulations (32 C.F.R. § 1602 *et seq.*) are involved. These regulations are extensive; so they are printed as Appendix D, *infra*, at pages 24 to 25.

STATEMENT OF THE CASE

Petitioner seeks review of the judgment of the United States Court of Appeals for the Tenth Circuit, affirming a judgment of the United States District Court for the District of Colorado. (See Appendix B, *infra,* at page 22.) The judgment of the district court was entered after trial without jury finding petitioner guilty of refusing to submit to induction into the armed forces in violation of the Universal Military Training and Service Act. [R. 13, 14]

Petitioner was indicted for refusal to submit to induction into the armed forces on June 24, 1957, at Denver, Colorado, contrary to the Universal Military Training and Service Act. [R. 4-5] He pleaded not guilty. [R. 6] He consented to a trial to the court without a jury. Evidence was heard. [R. 16-98] At the close of the evidence a motion for judgment of acquittal was made that was overruled followed by a finding of guilty. [R. 99-101] Petitioner was sentenced to serve fifteen months in the custody of the Attorney General. [R. 13-14] He duly and timely filed his notice of appeal to the Court of Appeals. [R. 14-15]

The Court of Appeals affirmed the judgment of the trial court by judgment entered on July 27, 1959. (Appendix B, *infra,* page 22.) An opinion was written stating reasons for the affirmance. (Appendix A, *infra,* pages 13 to 21.)

Petitioner registered with his local board and filed a classification questionnaire and a conscientious objector form showing that he was opposed to participation in both combatant and noncombatant military training and service. (F. 1, 3, 3A, 5, 13-15)[1] [R. 26] He was classified I-A and appealed. The appeal board reclassified him I-A on April 1, 1954. [R. 29] He was ordered to submit to induction on June 11, 1956, but his case was reopened and he was reprocessed and again classified I-A by his local board. (F. 5A, 32) He had a personal appearance before the board on August 17, 1956. (F. 5A, 34A) Upon the trial, evidence was adduced to show that the local board was not told by petitioner that he was in the full-time ministry averaging one hundred hours per month. [R. 78, 84, 88-89, 90, 93] The local board, after the hearing and without notice to petitioner, placed in the file a memorandum containing false statements that he had informed the board that he was devoting one hundred hours per month to preaching as a full-time minister. (F. 34A) [R. 87, 90]

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[1] Figures appearing herein within parentheses and preceded by "F." refer to page numbers of Selective Service file, Plaintiff's Exhibit 1.

Petitioner had a Department of Justice hearing before Maurice Evensen, a hearing officer, at Pueblo, Colorado. [R. 41, 78-79] The hearing officer did not call to Gonzales' attention the memorandum of the local board about false statements concerning full-time devotion to the ministry. [R. 42-43, 83-84, 93] After the hearing the hearing officer prepared a five-page typewritten report to the Conscientious Objector Section of the Department of Justice but petitioner had no notice of the contents of this report. [R. 58-59, 61] The review officer of the Department of Justice recommended to the appeal board that petitioner's claim for conscientious objector classification be denied because the memorandum of the local board showed that he stated he was devoting one hundred hours each month to the full-time ministry; whereas in truth and in fact he was devoting only 6½ hours to the ministry per month. (F. 36A-38) A copy of this recommendation was forwarded to petitioner by the appeal board. (F. 40) He answered it and denied that he stated to the local board he was devoting one hundred hours per month to the ministry at that time and emphasized that the only time he submitted such information was during the period when he was in the full-time ministry, October 1, 1952, to April 16, 1953. The appeal board on May 2, 1957, denied his claim for classification as a conscientious objector and classified him I-A. (F. 42)

Petitioner was ordered to report for induction and refused to submit on June 24, 1957. (F. 42, 42A, 43, 45A, 48) [R. 39]

Upon the trial petitioner subpoenaed for production the official report of the hearing officer [R. 43-45, 68-69] and the original F.B.I. reports used by the hearing officer in conducting his hearing and the review officer in making the final recommendation to the appeal board. [R. 59-60, 67-70] The Government moved to quash the subpoenas *duces tecum* and objected to the receipt into evidence of the documents, which motion was sustained by the court. [R. 50, 75-76] The petitioner claimed that the ruling of the court denied him his rights to procedural due process of law upon his trial, contrary to the Fifth Amendment to the United States Constitution. [R. 56-57, 72-73, 76] It was shown that the documents were a link in the administrative chain. [R. 59-60, 67-70]

REASONS FOR GRANTING THE WRIT

I.

The holding of the court below, finding that no error was committed by the trial court in excluding from the evidence the official typewritten report of the hearing officer to the Department of Justice, is out of harmony with the holding of this Court in *Jencks* v. *United States*, 353 U.S. 657 (1957), and in direct conflict with *United States* v. *Beekman*, 155 F.2d 580, 582-584 (2d Cir. 1946); *United States* v. *Andolschek*, 142 F.2d 503 (2d Cir. 1944); and *United States* v. *Krulewitch*, 145 F.2d 76 (2d Cir. 1944).

It has been held that, when the minutes or report made by the hearing officer are needed for the purpose of determining whether there was a denial of procedural due process at the hearing or in the recommendation, the documents can be compulsorily produced, notwithstanding the privilege claimed by the Attorney General, as was done in this case. —*United States* v. *Erikson*, 149 F. Supp. 576, 580 (S.D. N.Y. 1957).

The official typewritten report of the hearing officer was relevant when demanded, because petitioner intended to use it to corroborate his testimony that the hearing officer had denied a full and fair hearing. (*United States*

v. *Andolschek*, 142 F. 2d 503 (2d Cir. 1944)). When the hearing officer took the stand and attempted to contradict the testimony of petitioner and his witnesses the report of the hearing officer to the Department of Justice became more vitally material and relevant.—*United States* v. *Beekman*, 155 F. 2d 580, 582-584 (2d Cir. 1946); *United States* v. *Krulewitch*, 145 F. 2d 76, 78-79 (2d Cir. 1944); *Jencks* v. *United States*, 353 U. S. 657, 671 (1957).

In the event that this Court does not find that the holding below is out of harmony with *Jencks* v. *United States*, 353 U. S. 657 (1957), or that there is no conflict between the holding of the court below and the decisions of the other courts of appeals on this question, then it is respectfully submitted that this is such an important question of great national scope in the administration of the criminal sanctions clause of the draft law that this Court ought to grant the writ of certiorari in order to determine the question.

II.

The holding of the court below is out of harmony with *Jencks* v. *United States*, 353 U. S. 657 (1957), when it approved the ruling of the trial court excluding the F.B.I. report from evidence, which was offered for the purpose of determining whether or not the Department of Justice denied the petitioner a full and fair hearing by withholding favorable evidence from the appeal board.

At the trial the petitioner contended that the Department of Justice had not forwarded to the appeal board in the résumé all the favorable evidence that had been turned up by the F.B.I. inquiry.

Upon the trial it appeared that the hearing officer had the original F.B.I. report before him and that the original of it was sent to the Department of Justice in Washington along with the recommendation of the hearing officer and his report of the hearing. The trial court sustained the objection of the Government and ruled that the F.B.I. report was not material or relevant.

At the trial when the F.B.I. report was offered and upon the appeal the petitioner contended that the F.B.I. report was relevant to show that he had been denied procedural due process of law before the appeal board because the Department of Justice did not provide the petitioner and the appeal board with summaries of all the favorable evidence appearing in the F.B.I. report so as to overcome the adverse recommendation made to the appeal board and also to show that there was no basis in fact for denying the full conscientious objector claim. This was a fact issue in the district court. The question was whether the petitioner was wrongly denied the right to make proof when the ruling was made refusing to compel the production of the F.B.I. report for the purpose of comparison of it with the summaries provided by the Department of Justice to the petitioner and to the appeal board.

This ruling of the court below, denying petitioner the right to show a violation of procedural due process by the Department of Justice in withholding evidence from the appeal board, is out of harmony with *Jencks* v. *United States*, 353 U.S. 657, 761, (1957). There a statement given to the F.B.I. by a witness against the defendant was held to be relevant to test the accuracy of his testimony. Here the summary of the F.B.I. report was a "witness" against the petitioner in the appeal board. In the trial court, as a basis for acquittal, the petitioner contended that vital and important evidence favorable to his conscientious objector claim was omitted in the summary sent to the appeal board, thus denying procedural due process of law. This was not fair and just. Section 1 (c) of the Act (50 U.S. App. § 451 (c); see *supra*, page 5) provides for "a system of selection which is fair and just."

Petitioner to prove such denial of due process was entitled to test such summary, as a "witness" against him on his conscientious objector claim. He is allowed by due process of law in the district court to see whether such "witness" omitted important and material evidence supporting his conscientious objector claim that should have been given to the appeal board and exculpating him from the adverse recommendation made by the Department of Justice to the appeal board. It may very well be that a comparison of the F.B.I. report with the summary made of it to the appeal board will show a vital omission. But assume it will not. In any event the petitioner was entitled by procedural due process of law in the district court to attempt to prove the denial of due process by the Department of Justice in the draft board proceedings. Yet he was denied this right in the district court to call "witnesses" (the F.B.I. report), by the ruling of the trial court.

This question was presented to the court below in *Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir. 1958), and rejected. Certiorari was denied (356 U. S. 927; rehearing denied, 356 U. S. 964). It is submitted that the court committed error in deciding that Bouziden was not entitled to have the use of the F.B.I. reports at his trial. The court followed *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957), which was erroneously decided. To these two decisions should be added *Rogers* v. *United States*, 263 F. 2d 283 (9th Cir. 1959)(cert. denied April 20, 1959, 359 U. S. 967). But see *United States* v. *Jacobson*, 154 F. Supp. 103 (W.D. Wash. 1957), to the contrary by the same judge who wrote the opinion in the case of *Rogers* v. *United States*, 263 F. 2d 283 (9th Cir. 1959).

Both *Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir. 1958), and *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957), erroneously assumed that *United States* v. *Nugent*, 346 U. S. 1 (1953), prohibited the use of the reports *at the trial*. But that decision held only that the registrant was not entitled to the reports *in the administrative agency*. It did not hold that the reports could not be used at the trial for the purpose of establishing a denial of procedural due process.

The petitioner has support in the position here taken that the Court of Appeals erred in following *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957), when it decided

Bouziden v. *United States*, 251 F. 2d 728 (1958). The substance and merit of this question has been made more manifest by a recent decision of the United States District Court for the Southern District of New York in *United States* v. *Eliasson*, 170 F. Supp. 686 (February 2, 1959). By that decision the district court having the largest volume of business of any district court in the United States has determined that the position here taken by the petitioner is correct. Such court refused to follow *Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir. 1958) (cert. denied 356 U. S. 927, rehearing denied 356 U. S. 964), and *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957), and held that *United States* v. *Nugent*, 346 U. S. 1 (1953), did not command that the original F.B.I. reports be withheld from defendants in criminal cases. Because of the conflict in decision of the Southern District of New York with the Courts of Appeals for the Fourth, Ninth and Tenth Circuits this becomes an important question, national in scope, in the administration of the criminal sanctions clause of the Act so as to justify this Court in granting this petition.

CONCLUSION

WHEREFORE, for the reasons above stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

September, 1959

APPENDIX A

Opinion of Court of Appeals

(July 27, 1959)

Hayden C. Covington, (W. H. Erickson was with him on the brief) for Appellant.

Jack K. Anderson, Assistant United States Attorney, (Donald E. Kelley, United States Attorney; James C. Perrill, Assistant United States Attorney; and Daniel O. Omer, Col., JAGC, General Counsel, Selective Service System, were with him on the brief) for Appellee.

Before Bratton, Chief Judge, and Huxman and Lewis, United States Circuit Judges.

Huxman, Circuit Judge.

Appellant, Raymond Gonzales, Jr., was convicted of violating the Universal Military Training and Service Act, as amended, in that he knowingly and wilfully refused to submit to induction into the Military Forces of the United States. A somewhat detailed statement of the facts at the outset may be helpful in an orderly consideration of the questions presented for review.

Appellant is a male citizen of the United States and was subject to registration under the Universal Military Training and Service Act, as amended. He registered with Local Board Number 9, at Boulder, Colorado. In due course he was processed, was classified 1-A on November 13, 1952, and was duly notified of such classification. On receipt of his notice he requested a personal appearance, stating, in a letter dated November 22, 1952, that he was a minister devoting 100 hours a month to actual preaching and an additional 50 to 75 hours in preparation of such work. He attached four affidavits stating that he was engaged in full-time ministerial work.

On December 4, 1952, the Local Board classified him as a conscientious objector and placed him in Class 1-O. Thereafter, on June 30, 1953, the Local Board changed his classification to 1-A. Upon receipt of notice of this change, he requested a personal appearance before the Board and appended a letter appealing his classification. He was granted a hearing August 13, 1953. The Board, on its record, noted his appearance, granted him the right to appeal his 1-A classification, and entered a statement that it had reviewed his classification, reconsidered the information contained in his SSS Form 150, wherein it was stated that he believed in force to the extent that he would defend his person, his church and his home by killing, if necessary. The Board concluded that because of this, he should not be classified as a conscientious objector.

The Selective Service file was referred to the Justice Department, an investigation was conducted by the F.B.I., and its report, together with the file and other papers, was forwarded to Hearing Officer Fred M. Mazzula. He held a hearing in Denver which appellant attended. The Hearing Officer had the F.B.I. files and read them. He reported that appellant was a "sincere member of Jehovah's Witnesses and a believer in its tenets, but the teaching of this sect and the beliefs expressed by this registrant do not establish to the satisfaction of this Hearing Officer that the registrant is opposed to war in any form." The officer recommended that appellant's claim be not sustained. On February 1, 1954, T. Oscar Smith, Special Assistant to the Attorney General, in a letter to the Chairman of the Appeal Board, reviewed appellant's record, quoted from the Hearing Officer's report, and stated, "After consideration of the entire file and record, the Department of Justice finds that the registrant's objections to combatant and noncombatant service are not sustained. It is, therefore, recommended to your Board that registrant's claim for exemption from both combatant and noncombatant training and service be not sustained."

The Appeal Board classified appellant 1-A on April 1, 1954, and on return of the file to the Local Board, the Local Board again classified appellant 1-A, and on May 23, 1956, ordered him to report for induction on June 11, 1956. Notwithstanding his refusal to report, he was not prosecuted. His order to report was cancelled and his case was reopened and he was again classified 1-A. His request for a personal hearing was granted and a personal hearing was held August 17, 1956. He was again classified 1-A. His file was again forwarded to the Appeal Board and was again forwarded to the Justice Department for inquiry and hearing. The entire file, including the F.B.I. report, was forwarded to Hearing Officer Maurice Evensen. He sent a resume of the F.B.I. inquiry to appellant before the scheduled hearing. Appellant again attended the hearing. Hearing Officer Evensen concluded his report and reported that registrant was opposed to combatant training and service but concluded that registrant was not opposed to noncombatant training and service. He, therefore, recommended that registrant be exempt from combatant training and service only. Upon receipt of the Hearing Officer's report, the Justice Department reviewed it. The Department did not agree with the conclusion of the Hearing Officer.

In a letter to the Appeal Board dated March 21, 1957, the Justice Department recommended that appellant's claim be not sustained. It pointed out that while, as shown by the Board's records, appellant claimed that he was still devoting 100 hours per month to actual preaching, the report of the F.B.I., made a part of the recommendation, showed that he devoted only 20 to 25 hours per month to church activities and only approximately six and one-half hours per month to actual preaching. The Justice Department concluded by stating, "On the other hand the registrant's claim as to the amount of his religious activities is so highly exaggerated, if we are to believe the official records of his religious organization as reported in the resume and recapitulated above, as to cast doubt upon his veracity and, consequently, upon his sincerity and good faith. Therefore, with due respect to the Hearing Officer's recommendation, the Department of Justice finds that the registrant's claim is not sustained. Accordingly, it is recommended to the Board that registrant's claim be not sustained." A copy of this recommendation was mailed by the Appeal Board to appellant. He answered it and stated that he did not inform the Local Board on August 17, 1956, as contended by the recommendation, that he was devoting 100 hours per month to preaching; that the only time he submitted such information was when he was pioneering, which was in the period of October 1, 1952 to April 16, 1953. On May 2, 1957, the State Appeal Board unanimously concurred in the recommendation of the Justice Department and classified appellant 1-A. Upon return of the file to the Local Board, he was notified of such classification. Thereafter, a new order to report was issued which appellant again ignored and this prosecution followed.

What occurred at the hearing on August 17, 1956, is in a large measure the crux of this case. It is conceded that at that time appellant was not engaged as a full-time minister and was not devoting approximately 100 hours per month to preaching and 50 to 75 hours additional in preparation for preaching. If, in fact, he told the Local Board at that time, as is recorded on its record, that he was so engaged, he was guilty of a false statement which would support a conclusion that he had not painted a complete or accurate picture, and would warrant the further conclusion that he was not sincere in his claim that he was a conscientious objector opposed to all forms of participation in combatant and noncombatant military activity[1] and would support the 1-A classification he received.

It is strenuously urged that appellant did not on August 17, 1956, state to the Board that he was engaged as a full-time minister, devoting 100 hours per month to preaching and 50 to 75 hours per month in preparation for such work. The Board did, at that time, record on its record of his case that that is what he stated. The contention is made that this record was made without receiving such testimony from appellant. In support thereof, it is pointed out that the fourth paragraph of the Board's report of August 17, 1956, is in the identical language of the fourth paragraph of appellant's letter of November 22, 1952, in which he did state that he was, at that time, devoting 100 hours per month to actual preaching and from 50 to 75 additional hours in preparation for such work. But it does not follow from this that no such statement was made by him, in substance, at the August 17 meeting. Even if we assume that the Board copied the fourth paragraph of appellant's letter of November 22, it would not impeach its record if, in fact, he told the Board substantially the same thing he stated in his letter of November 22.

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[1] Dickinson v. U. S., 346 U. S. 389; Witmer v. U. S., 348 U. S. 375.

When reviewing a classification made by a Board, a court is limited in its jurisdiction to ascertain whether there is no evidence to sustain the classification. The court may not weigh the evidence to determine whether the classification was justified.[2]

The duty rested upon appellant to make a full disclosure to the Board of all relevant facts affecting his status on August 17, 1956. It is conceded that he did not, at that time, tell the Board of his change of status from that claimed in his letter of November 22. His only answer is that he was not asked, but that is not sufficient to discharge the duty resting upon him to make a full disclosure of his status at that time. While he claims that he was denied the opportunity to adduce additional evidence, there is testimony in the record which would support a contrary conclusion.

The law is well settled that the recommendations of the Justice Department to the Board as to a registrant's classification is just that, and is not binding on the Board. No attempt will be made to analyze all the cases cited by appellant to sustain his contention that the recommendation by the Justice Department in this case requires a reversal. Among these cases are U. S. v. Close, 215 F. 2d 439; Hinkle v. U. S., 216 F. 2d 8; and Shepherd v. U. S., 217 F. 2d 942. In the Close case, the court held that an F.B.I. report reporting evidence with people whose views varied as to the sincerity of registrant's claim for exemption as a conscientious objector was not proper evidentiary basis upon which the Local Board could deny exemption. In the Hinkle case, the Board acted upon the advice of the Justice Department that the registrant could not claim exemption because he stated that he would kill in self defense in the protection of his home and because of his belief in the justification of theocratic war. The Shepherd case was also decided upon erroneous legal advice given by the Justice Department. An examination of all the remaining cases shows them clearly distinguishable upon the facts.

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[2] Dickinson v. U.S., 346 U.S. 389.

In this case, the Justice Department merely advised that if the official record of the Board was to be believed, then his claim to ministerial exemption was so exaggerated as to cast doubt upon his sincerity, and, therefore, it recommended that the claim be not sustained. This left to the Board the decision whether the claim as to ministerial activities was exaggerated, and it resolved that question against appellant. We think it is clear in the record that the Board treated the communication by the Justice Department merely as its recommendation, considered it in light of the record of the Local Board, concluded that appellant had been guilty of gross misrepresentation of his ministerial status at the hearing before the Local Board on August 17, 1956, that because of such misrepresentation, he was not sincere in his claim that he was opposed to participation in war and in activities furthering the war effort, and based on those conclusions, classified him I-A. It is our further view that the record is not without evidence to support these conclusions.

What has been said, disposes of the second assignment of error that the final 1-A classification was arbitrary and capricious because it was without basis in fact. What has been said requires an affirmance of the judgment unless there was a denial of procedural due process under the Act or Regulations promulgated thereunder, or denial of due process under the Fifth Amendment.

It is contended that the Department of Justice denied appellant due process of law in failing to supply to the Appeal Board and to appellant a copy of each Hearing Officer's report. With respect to the hearing held before Officer Mazzula, it is sufficient to say that appellant's final classification was not based on that report or on the investigation of the F.B.I. That classification was set aside. When he appealed a second time, a second investigation was made by the F.B.I. Its report was furnished to Hearing Officer Evensen. He made available to appellant a resume of that report. In U. S. v. Nugent, 346 U. S. 1, the Supreme Court held that a registrant was not entitled to the F.B.I. report for inspection, and that all he was entitled to was a fair resume of any adverse evidence in the investigator's report.[3] In Bouziden v. U. S., 251 F. 2d 728, we stated, "The fact that the Justice Department's recommendation forms a part of the record and the complete file is not before the Board of Appeals, does not make the board's action unlawful (since this is a determinative procedure set by statute) if there is a basis in fact to be found in the whole record."

Aside from that, the failure of the Justice Department to send the complete F.B.I. file to the Appeal Board, could not have misled it to appellant's prejudice as to the basis of the Department's recommendation that appellant be classified 1-A. Its recommendation was based on the sole ground that appellant's statement at the hearing of August 17, 1956, that he was spending 100 hours a month in preaching and 50 to 75 hours additional in preparation for such work would raise a serious question as to his sincerity and would justify a 1-A classification. The only part of the F.B.I. report relied upon by the Justice Department or alluded to in support of its recommendation to the Board was that part which reported what the church record showed as to the amount of time spent by appellant on August 17, 1956, in ministerial work, or in preparation of such work, and there is no claim that the F.B.I. did not correctly report these facts.

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[3] Hearing Officer Evensen furnished appellant with a resume of the F. B. I. report, and there is no showing in the record that it was not a fair resume.

It is further contended that appellant was denied a fair hearing guaranteed by the Fifth Amendment when the court refused to compel the production of the F.B.I. reports, which were shown to be material and relevant, because appellant needed them to prove the defenses urged by him that he was denied procedural due process before the Appeal Board by the failure of the Justice Department to make an accurate summary of the F.B.I. reports, and thereby withheld from the Appeal Board evidence favorable to his conscientious objector's claim. If a defendant in a criminal case may compel the production of the F.B.I. reports which are made for the benefit of the Justice Department by merely stating that the Justice Department failed to make a fair summary of the evidence in its recommendation to the Board, then the pronouncement by the courts in cases such as U. S. v. Nugent, 346 U. S. 1; Bouziden v. U. S., 251 F. 2d 728; and Stasevic v. U. S., 117 F. Supp. 371, to the contrary, become meaningless. These cases all point out why a defendant is not entitled to the production of these reports and no effort will be made to restate what has been said therein.

As was stated at the beginning, the crux of this case is whether at the August 17, 1956 hearing before the Local Board, appellant represented he was still devoting 100 hours a month to preaching and 50 to 75 hours additional in preparation of such work, when the fact is that he was only devoting a few hours per month to such work. The finding that he made this false representation finds support in the record and sustains the conclusion that he was not sincere in claiming to be a conscientious objector, and that, in turn, sustains the 1-A classification he received. The record also supports the further conclusion that he was afforded an opportunity at the hearing before the Local Board on August 17, 1956, to make a full disclosure of his status and present any evidence tending to support his claim. This opportunity was also afforded him before the Hearing Officer. It is no defense to say he was not asked about his change in ministerial status. The Board and the Hearing Officer were not there to develop anything. They were there to afford him an opportunity to present anything he had to offer in support of his claim. This constituted due process under the Act and its regulations, as well as under the Fifth Amendment.

Affirmed.

APPENDIX B

Judgment of Court of Appeals

Thirty-ninth Day, May Term, Monday, July 27th, 1959.

Before Honorable Sam G. Bratton, Chief Judge, Honorable Walter A. Huxman and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Raymond Gonzales, Jr., appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

APPENDIX C

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 25th, 1959.

(S) Charles E. Whittaker

Associate Justice of the
Supreme Court of the United States

Dated this 24th
day of August, 1959.

APPENDIX D

Section 1622.11 of the Regulations (32 C. F. R. § 1622.11; E. O. 10292; 16 F. R. 9862, Sept. 28, 1951) reads as follows:

§ 1622.11 *Class I-A-O: Conscientious objector available for noncombatant military service only.* (a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

Section 1622.14 of the Regulations (32 C. F. R. § 1622.14; E. O. 10420, 17 F. R. 11593, Dec. 19, 1952) reads as follows:

§ 1622.14 *Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.* (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

(b) Section 6 (j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

(Section 1622.14 (b) contained in E. O. 10292, 16 F. R. 9862, Sept. 28, 1951.)

Sections 1626.25 (a), 1626.25 (b) and 1626.25 (c) of the Regulations (32 C. F. R. §§ 1626.25 (a), 1626.25 (b) and 1626.25 (c); E. O. 10363, 17 F. R. 5446, June 18, 1952) read as follows:

§ 1626.25 *Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in combatant training and service in the armed forces, but not conscientiously opposed to participation in noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judical district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified

the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice.

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In the Supreme Court of the United States

October Term, 1959

No. 416

Raymond Gonzales, Jr., petitioner
v.
United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 13-21) is reported at 269 F. 2d 613.

JURISDICTION

The judgment of the Court of Appeals was entered on July 27, 1959 (Pet. App. 22). On August 24, 1959, Mr. Justice Whittaker entered an order extending the time for filing a petition for a writ of certiorari to and including September 25, 1959 (Pet. App. 23). The petition was filed on September 21, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly quashed a subpoena for production of F.B.I. reports considered by the hearing officer in relation to petitioner's claim for classification as a conscientious objector, where no showing was made that there was any reason to believe that the resume given to petitioner was inaccurate.

2. Whether the Department of Justice was required to furnish to petitioner and the appeal board, in addition to its recommendation, a copy of the report made to the Department by its hearing officer.

Petitioner also raises as a question but does not argue the following:

3. Whether there was basis in fact for denial of classification of petitioner as a conscientious objector.

STATUTE AND REGULATIONS INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 612, 622, 64 Stat. 1072, 1075, 65 Stat. 75, 86:

> Section 6(j) [50 U.S.C. App. (1952 ed.) 456(j)]:
>
> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral

code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations, as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

Section 10(b)(3) [50 U.S.C. App. (1952 ed.) 460(b)(3)]:

* * * [L]ocal boards * * * shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken * * *. The decision of * * * appeal boards shall be final in cases before them on appeal unless modified or changed by the President. * * *

Section 12(a) [50 U.S.C. App. (1952 ed.) 462(a)]:

> Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

32 C.F.R. 1626.25 (E.O. 10363, 17 F.R. 5456, June 18, 1952):

> (a)(2) * * * If * * * the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file * * * for the purpose of securing an advisory recommendation from the Department of Justice.
>
> * * * * *
>
> (c) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Tenth Circuit (Pet. App. 22) affirming the judgment of the District Court for the District of Colorado, finding petitioner guilty, upon trial before the court without a jury, of refusal to serve in the armed forces, in violation of the Universal Military Training and Service Act, Section 12(a) (R. 12-14).[1] Petitioner was sentenced to 15 months' imprisonment (R. 14).

The record may be summarized as follows:

Petitioner registered under the Selective Service System on March 17, 1952, stating his occupation as the cut stone business and as minister for Jehovah's Witnesses (F. 1A). On October 31, 1952, he filed his classification questionnaire claiming classification IV-D as a minister (F. 5), and stating that he had served as minister of Jehovah's Witnesses since August 14, 1948, having been "formally ordained" on April 3, 1949 (F. 3). In a letter also filed on October 31, 1952, petitioner stated that he spent a minimum of 100 hours per month "in actual preaching" and also served as Theocratic Ministry School Instructor and Stock Servant at the Longmont, Colorado, company, and that his temporary night employment at a sugar mill allowed time for the preaching work (F. 6). He also claimed conscientious opposition to participation in war in any form (F. 5).

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[1] The designation "R." refers to the transcript of record of the trial in the district court. "F." refers to the file of the Selective Service System, constituting the government's exhibit No. 1 at the trial.

Petitioner's file also discloses a certificate of appointment as a Pioneer, dated October 1, 1952, and letters from the Watchtower Bible and Tract Society, dated April 17, 1951, and March 1, 1952, respectively, stating his appointment as Stock Servant and School Servant (F. 7–8B).

The questionnaire bore on its first page the instruction to report to the local board any "new fact" which "may affect" the classification (F. 2).

On November 5, 1952, petitioner filed his Special Form for Conscientious Objector (F. 13).

On December 4, 1952, petitioner was classified I–O (F. 5A). On April 1, 1953, after 6 months of the full-time Pioneering, he ceased devoting 100 hours per month to preaching, and was no longer of the status of Pioneer. He did not notify the local board of this change (R. 84, 97).

On July 30, 1953, the local board, apparently in a customary periodic review of classifications (R. 37–38), reclassified petitioner as I–A (F. 5A). Petitioner protested, upon the basis of the claim he had submitted as a conscientious objector (F. 19, 20B). Upon personal appearance before the local board on August 13, 1953, the I–A classification was upheld by reason of petitioner's willingness to kill in defense of his church and home (F. 21A). After appeal and a hearing before the Department of Justice, petitioner was classified I–A on this theory.[2] A resume of the investigative report of the F.B.I. accompanying the recommendation of the Department of Justice included the statement that the headquarters of the Jehovah's Witnesses had reported that petitioner was no longer devoting 100 hours per month to preaching and had relinquished his position as a Bible Study Servant (F. 23A).

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[2] This Court's decision to the contrary, in *Sicurella* v. *United States*, 348 U.S. 385, was not handed down until March 14, 1955.

On May 2, 1956, the local board mailed a form marital inquiry to petitioner. Petitioner replied stating that he was now self-employed at masonry work in Colorado Springs and "as you already know" an active member of the Jehovah's Witnesses unit at Colorado Springs. He did not inform the board of the loss of his Pioneer status (F. 5A, 25). Petitioner's case was reopened, and upon *de novo* consideration by the local board he was classified I–A (F. 31, 32A). At a personal appearance before the local board on August 17, 1956, petitioner claimed that he was a minister and thereby entitled to IV–D classification (R. 86, 88, 97; F. 34A).[3] He further claimed that the status of minister "automatically" classified him as a conscientious objector, but the local board informed petitioner that this was not correct (R. 86; F. 34A). The board's memorandum of the meeting, filed on the same date as the meeting,[4] reports petitioner as stating to the board that he was devoting 100 hours to actual preaching, and an additional 50 to 75 hours in preparation for ministerial duties, and that he also served as Stock Servant (F. 34A). Petitioner, at the trial, denied having made this statement (R. 86).[5] The memorandum recited, and petitioner admitted at the trial, that he was asked whether he had any new matter to file, and that petitioner filed only the certificate of his marriage (R. 77, 87; F. 34A).

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[3] The local board's memorandum and petitioner's testimony at the trial are identical on this point (R. 86, 97; F. 34A).

[4] The meeting was set for 1:30 p.m. of that day (F. 34).

On appeal, the matter was referred to the Department of Justice for recommendation. Petitioner was given a resume of the F.B.I. investigation which was to the effect that petitioner was of good reputation, and that his employer, acquaintances, neighbors and religious associates considered petitioner sincere in his religious beliefs and in his claim as a conscientious objector. The report contained a statement that petitioner's religious organization reported that he was devoting 6½ hours a week to preaching.[6]

After a hearing before Maurice A. Evenson, a hearing officer of the Department of Justice, the Department of Justice recommended to the appeal board on March 21, 1957, that petitioner's claim be not sustained (F. 36A–38). The hearing officer had concluded that petitioner's beliefs were opposed to combatant training and service but not to participation in war in noncombatant form (F. 37A), but the Departmental recommendation was given against any exemption. The recommendation stated that "the registrant's claim as to the amount of his religious activities is so highly exaggerated, if we are to believe the official records of his religious organization as reported in the resume and recapitulated above, as to cast doubt upon his veracity and, consequently, upon his sincerity and good faith" (F. 38).[7] In reply to the Departmental recommendation, petitioner wrote to the appeal board denying, *inter alia,* that he had claimed 100 hours per month of public preaching at the time of the local board hearing on August 17, 1956 (F. 41). At the same time he furnished a new address to the local board (F. 40A).

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[5] The statement of petitioner appearing in quotation marks in the board's memorandum of the appearance is in the language of petitioner's earlier letter to the board, *supra*, p. 6. It does not appear whether the letter was read to petitioner from the file and confirmed by him, or re-read by petitioner from the file or from a copy.

[6] The report also stated that at one time in April 1956, petitioner was fingerprinted and photographed, but no arrest card was made up. Petitioner explained to the F.B.I. that police had mistaken him for someone who had attempted to pick up a woman on the street (F. 38A–39A). The hearing officer informed petitioner that he had observed that petitioner was not arrested nor were any charges filed in connection with this incident, so "it would have no bearing" against petitioner (R. 82).

The appeal board unanimously classified petitioner as I-A (F. 42). On June 3, 1957, petitioner was ordered to report for induction (F. 43). On June 11, 1957, he wrote to the local board advising that his wife was pregnant and inquiring whether this would afford a change of his draft status (F. 44). The local board notified petitioner of the regulation providing that, if a registrant failed to notify of expectant fatherhood until after order for induction, it would be too late for consideration (F. 45).

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[7] The Congregational Servant of petitioner's group reported that for the period September 1954 through September 1956, petitioner had devoted an average of six and one-half hours per month to preaching and 20 to 25 hours per week in church activity (F. 38A).

On June 24, 1957, upon ground of conscientious objection, petitioner refused to be inducted (F. 45A, 48).

At the trial in the District Court, the government introduced petitioner's selective service file in evidence (R. 24–38). Petitioner called as a witness the hearing officer of the Department of Justice, Maurice Evensen, before whom he had appeared on January 7, 1957 (R. 40). Evensen testified that he had no recollection of any discussion by petitioner of his claims as to time spent in preaching (R. 42–43). Evensen testified, further, that he sent petitioner the resume of the F.B.I. reports (R. 41, 59), and that petitioner made no objection to the resume, and made no request to see the reports themselves (R. 63).

Petitioner sought to subpoena Evensen's longhand notes, his report to the Department of Justice, and the F.B.I. reports to the Department of Justice, for the purpose of testing whether there had been a denial of procedural due process in petitioner's appearance before Evensen and whether the Department of Justice, in its letter of recommendation, had "withheld" evidence favorable to petitioner (R. 40, 68–69). Petitioner did not specify or indicate the existence of any procedural errors or evidence withheld. Upon the motion of the government, the subpoena was quashed, the court observing that Evensen was petitioner's own witness (R. 50–51).[5]

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[5] Petitioner also called as a witness, Fred M. Mazzulla, a hearing officer of the Department of Justice, before whom petitioner had appeared on November 4, 1953 (R. 118–119) on the prior appeal (*supra*, p. 7). Mazzulla testified that he had no

Petitioner also sought to subpoena the original F.B.I. reports to the Department of Justice (R. 59-60, 67, 69–70), in order to disclose favorable evidence therein not forwarded to the appeal board (R. 76). Upon the government's objection, based upon *Bouziden* v. *United States*, 251 F. 2d 728 (C.A. 10), certiorari denied, 356 U.S. 927, and upon the nature of petitioner's request as an unsupported "fishing expedition" (R. 76), the subpoena was quashed (R. 76).

Petitioner testified (R. 77–98), setting forth the substance of the testimony by himself and his witnesses at his personal appearance before Evensen and stating his version of his appearance before the local board (*see supra*, pp. 8–9).

The District Court found that there was basis in fact for the rejection by the local and appeal boards of petitioner's claim of exemption as a conscientious objector (R. 111–112); that the local board's report of petitioner's statements before it on August 17, 1956, as to hours devoted to preaching, would probably reflect the statements accurately, the report having been made promptly after petitioner's appearance before the board (R. 112);[9] that procedural due process was

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independent recollection of petitioner's appearance before him (R. 72). Petitioner requested that the court require Mazzulla to produce his longhand notes and his report to the Department of Justice (summarized in the letter of the Department of Justice dated February 1, 1954), "to establish what occurred, and as to whether or not [petitioner] was given the procedural safeguards provided by the Selective Service Act and the Constitution" (R. 72–73). The request was denied (R. 73).

[9] The date of petitioner's appearance appears inaccurately as August 16 at this point in the transcript of the District Court trial. The actual date was August 17, 1956 (*supra*, p. 8).

not denied petitioner at this appearance (R. 112), at the appearance before Evensen (R. 112–113), and in the letter of the Department of Justice to the appeal board (R. 112–113). The court held further that the hearing officer's report to the Department of Justice, as distinguished from the Department's recommendation to the appeal board, was not required, under the act or regulations or as a matter of due process, to be sent to the appeal board (R. 114).

The Court of Appeals affirmed the judgment, adverting to the local board's record of petitioner's statements and to petitioner's admitted failure, at the least, to make the full disclosure of his changed status that was required of him (Pet. App. 17, 20–21). The court further held that, under *United States* v. *Nugent*, 346 U.S. 1, and *Bouziden* v. *United States*, *supra*, it was not required that petitioner or the appeal board be furnished the reports made to the Department of Justice by the hearing officer and the F.B.I. (Pet. App. 19–20).

ARGUMENT

The only questions argued in the petition for a writ of certiorari are the propriety of the trial court's action in quashing subpoenas seeking production of (1) reports made to the Department of Justice by the F.B.I. and (2) the recommendation of the hearing officer preliminary to the issuance by the Department of its letter recommending to the appeal board that petitioner's claim of exemption as a conscientious objector be denied.

1. As to the F.B.I. reports, the issue sought to be raised has been, as petitioner is aware (Pet. 10–11),

decided adversely to petitioner's contention in four cases since the decision of this Court in *Jencks* v. *United States,* 353 U.S. 657. Certiorari was sought in three of these cases and denied. *Leifer* v. *United States,* 260 F. 2d 648 (C.A. 6), certiorari denied, 358 U.S. 946, No. 525, O.T. 1958; *Bouziden* v. *United States,* 251 F. 2d 728 (C.A. 10), certiorari denied, 356 U.S. 927, No. 804, O.T. 1957; *Blalock* v. *United States,* 247 F. 2d 615 (C.A. 4); *Rogers* v. *United States,* 263 F. 2d 283 (C.A. 9), certiorari denied, 359 U.S. 967, No. 735, O.T. 1958. We respectfully refer the Court to the government's briefs in opposition in the *Leifer, Bouziden,* and *Rogers* cases.[10]

As noted in the Statement, petitioner, before the hearing, had been furnished the resume of the F.B.I. reports, constituting all that he was entitled to receive under this Court's decision in *United States* v. *Nugent,* 346 U.S. 1. The resume indicated that the reports were generally favorable. The resume mentioned also the material fact, which petitioner does not dispute, that his own religious organization reported that petitioner had ceased to be a Pioneer and was devoting only 6½ hours a month to preaching.

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[10] Petitioner again seeks to rely upon the opinion of the United States District Court for the Southern District of New York in *United States* v. *Eliasson,* 170 F. Supp. 686, in which that court ruled, contrary to the decisions cited above, that a registrant was entitled to inspect the investigatory reports, but that the names and addresses of informants could be eliminated prior to inspection. This opinion was discussed in the *Rogers* brief in opposition, *supra,* pointing out that the Court of Appeals for the Second Circuit has not had occasion to pass on this issue, and that there is thus no conflict among the circuits.

The crux of this case is the relationship between this admitted fact as against the report of petitioner's own statements before the local board which are part of his open file. Since the F.B.I. reports did not relate to petitioner's statement, but only to the facts obtained from his religious organization, which are not contested, the full F.B.I. reports have no relevancy to the real issues in the case.

2. Petitioner also contends that he was denied procedural due process in that the Department of Justice did not accompany its letter of recommendation to the appeal board with the text of the recommendation made to the Department by its hearing officer. The Department, in its letter, disclosed to the appeal board that the hearing officer had recommended exemption as to combatant services. It thus informed the appeal board of the fact that the hearing officer had to that extent found petitioner sincere. The letter then set out the reason why the Department reached a contrary conclusion based, not upon what occurred at the hearing, but on petitioner's prior statements to the draft board. While petitioner asserts now, in the petition for a writ of certiorari, that he was claiming that he did not have a fair hearing before the hearing officer (Pet. 8–9), that was not his contention either before the appeal board or at the trial. His contention was, as his letter to the appeal board shows, that he did not at his hearing before the local board in August 1956, claim that he was devoting 100 hours to the ministry. The hearing officer's recommendation to the Department had no bearing on this issue.

The Department of Justice merely makes a recommendation to the appeal board. As observed in *Gonzales* v. *United States,* 348 U.S. 407, 415, fn. 6, the regulations (32 CFR 1626.24(b)) provide that the appeal board may not consider information not contained in the local board record or in the recommendation of the Department of Justice. There was thus no reason why the intermediate recommendation of the hearing officer to the Department, which did not go to the appeal board, should be produced at the trial, particularly where, as here, it had no relevancy to the issue at the trial. See *Bouziden* v. *United States,* 251 F. 2d 728, 732 (C.A. 10), certiorari denied, 356 U.S. 927. It is noteworthy that this Court in *Gonzales, supra,* accorded no right to a registrant to go behind the departmental recommendation which was the sole document before the appeal board. The Court stated, "the right [of the registrant] to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts *in the file* and made with awareness of the recommendations and arguments *to be countered*" (348 U.S. at 415; emphasis added). Here, petitioner was fully informed of the fact that the recommendation against his claim was based, not upon the hearing officer's relatively favorable report, but upon the Department's unfavorable finding of misrepresentation by petitioner to the local board. Petitioner was fully enabled to make answer to the appeal board and he attempted to do so. His difficulty was not in insufficiency of information but simply that he could not deny that he had long since ceased to devote 100 hours per month to preaching, and that his record of nondisclosure of this change tended to negate his denial that he had continued to claim the 100 hours.

3. Petitioner states as a question presented, but does not argue, that he was improperly denied classification as a conscientious objector in that the Department of Justice should not have found that he had misrepresented to the local board the hours devoted to public preaching. It is, however, undisputed that when petitioner appeared before the local board on August 17, 1956, he was preaching only 6½ hours per month. He had preached 100 hours per month only in the six months period that began in October 1952, the month in which he filed his classification questionnaire, and ended in April 1953, over three years before his appearance before the board. It is equally undisputed that he nevertheless affirmatively claimed the status of minister at the appearance in question without disclosing his lack of Pioneer status. It is likewise undisputed that during the intervening three-year period he at no time obeyed the requirement in the instructions that he inform the board of any new fact which "may affect" his classification, and even at the appearance itself, when asked whether he had any new matter to present, he only presented the fact of his marriage. The nondisclosure cannot be brushed aside as mere inadvertence, for in originally presenting his claim to a ministerial exemption, petitioner had not only written a letter setting forth the critical number of hours devoted to preaching, but had filed

the certificate to his status as "Pioneer" together with a number of affidavits. He could not be unaware that, whatever his own or his organization's broad view of what a ministerial status might be, a continued claim to the Selective Service System for a ministerial status would embody the same representations of extensive hours of public preaching that had been required and presented theretofore. Moreover, he was not oblivious of the needs of full disclosure when it would serve his purposes. He brought his marriage certificate to the board, and, in 1957, he notified the board of his wife's pregnancy and inquired as to possible resultant change in status. Conversely, when the local board mailed a form inquiring as to present status on May 2, 1956, he merely replied that he was self-employed at masonry work in Colorado Springs and an active member of the Jehovah's Witnesses unit; he made no mention of his loss of Pioneer status three years earlier.

It was in this posture that the appeal board had to consider the one disputed fact—petitioner's self-serving assertion that the local board had falsified the record of his personal oral statement before it. As against the local board's record, filed promptly after the appearance itself, that petitioner had reiterated his claim to 100 hours of preaching per month, petitioner's testimony was that although he had admittedly claimed the classification of minister, he had not made the necessary supporting claim of 100 hours of preaching per month. The board's record, in quoting petitioner in the language of his earlier letter, indicated a reading or reaffirmation of the letter by petitioner before the board. The District Court, like the appeal board and the Department of Justice, was fully entitled to rely upon the official board record as against petitioner's self-serving statement long after the fact. It follows from the foregoing that there was sufficient basis for disbelief of petitioner's claim of conscientious objection to service in the armed forces. Gross misrepresentation is an objective fact affording substantial insight with respect to the existence of that deeply religious sincerity associated with a conscience. As this Court said in *Witmer* v. *United States,* 348 U.S. 375, 381–382:

> * * * [T]he ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. In these cases, objective facts are relevant only insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. In conscientious objector cases, therefore, any fact which casts doubt on the veracity of the registrant is relevant. It is "affirmative evidence * * * that a registrant has not painted a complete and accurate picture * * *" * * *.

CONCLUSION

The decision below is a proper application of established principles to a particular factual situation. No conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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BRIEF FOR

PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 416

RAYMOND GONZALES, JR., Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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ONE

The Department of Justice denied petitioner procedural due process of law in the proceedings in the Department of Justice by not giving petitioner timely opportunity, before the final recommendation by the Department of Justice was made to the appeal board, to answer facts appearing in a false memorandum prepared by the local board and placed in the draft board file without notice to petitioner and relied upon by the Department of Justice in its recommendation to the appeal board without prior notice to petitioner, to the effect that petitioner had exaggerated the number of hours devoted to preaching and the number of hours devoted to preparation for the ministry, all contrary to the "fair and just" provisions of the Act and the Due Process Clause of the Fifth Amendment to the United States Constitution. 26

TWO

Petitioner was denied procedural due process of law by the Department of Justice excluding from the draft board file the report of the Department of Justice hearing officer, pursuant to Section 1626.25 of the Selective Service Regulation (32 C. F. R. § 1626.25),

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contrary to the provision of earlier Regulations that stood for over ten years and was in existence at the time of the enactment and re-enactment of the present law, which provided for the inclusion in the draft board file of the hearing officer's report rather than merely referring to it, as was done in this case in the recommendation of the Department of Justice to the appeal board, and which said exclusion of the report from the file also denied petitioner a full and fair hearing and due process of law before the appeal board, contrary to the "fair and just" provisions of the Act and the Fifth Amendment to the United States Constitution. 30

THREE

Petitioner was denied his right to a full and fair hearing in the District Court contrary to the Fifth Amendment when the trial court quashed the subpoena *duces tecum* calling for the production of the formal typewritten and legally-required report of the hearing officer concerning the hearing conducted by him and attended by petitioner and his witnesses, which was material and relevant and needed by petitioner at the trial to prove that the hearing officer denied petitioner procedural due process and did not conduct a full and fair hearing required by law. 36

FOUR

Petitioner was denied a full and fair hearing in the District Court, contrary to the Fifth Amendment, when the trial court quashed the subpoenas *duces tecum* calling for the production of the FBI investigative reports used by the Department of

PAGE

Justice in conducting the hearing, making a report thereon and in making the recommendation to the appeal board, which documents were needed by petitioner to prove his defense that the Department of Justice had withheld favorable evidence from the appeal board and summarized the unfavorable evidence out of context and with a warped meaning, misleading the appeal board. 40

FIVE

In the event the Court concludes that *United States* v. *Nugent,* 346 U. S. 1 (1953), keeps petitioner from obtaining the use of the original FBI reports at his trial under the indictment, then this Court is requested to overrule and set aside *United States* v. *Nugent,* 346 U. S. 1 (1953), because it was erroneously decided and it does not correctly interpret and apply the Act or the Fifth Amendment to the United States Constitution. 62

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Supreme Court of the United States

October Term, 1959

No. 416

RAYMOND GONZALES, JR., Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit in this case is reported at 269 F. 2d 613 (July 27, 1959). It also appears in the record. [R. 186-193][1] It is Appendix A to the petition for writ of certiorari at pages 13-21. No opinion was written by the District Court. The Judge stated orally, however, his reasons for overruling the motion for judgment of acquittal. [R. 114-117] The District Court also made findings of fact. [R. 118-119]

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[1] Numbers appearing herein within brackets and preceded by "R." refer to pages of the printed record in this case.

JURISDICTION

The judgment of the Court of Appeals was entered July 27, 1959. [R. 194] The time for filing a petition for writ of certiorari in this Court was duly extended to September 25, 1959. [R. 195] The petition was filed September 21, 1959. [R. *cover*] Jurisdiction of this Court is, therefore, properly invoked under 62 Stat. 928 (1948), 28 U.S.C. § 1254(1). See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure. The District Court had jurisdiction of the indictment under 62 Stat. 826 (1948), 18 U.S.C. § 3231.

QUESTIONS PRESENTED

I.

Whether the Department of Justice and the local board denied petitioner procedural due process of law in the proceedings in the Department of Justice by not giving petitioner timely opportunity before the final recommendation by the Department of Justice was made to the appeal board to answer a false memorandum prepared by the local board without notice to petitioner and relied upon by the Department of Justice in its recommendation without prior notice to the petitioner to the effect that petitioner had exaggerated the number of hours devoted to preaching and the number of hours devoted to preparation for ministerial duties, indicating that he was a full-time minister, when as a matter of fact he—long prior to the date of the recommendation—changed from full time to only part time devoted to his ministry, of which change both the local board and the Department of Justice had notice before the adverse action taken by each from papers in the draft board file.

II.

Whether Section 1626.25 of the Selective Service Regulations (*infra,* page 84) as construed and applied to petitioner, is void because it excludes from the draft board file the report of the conscientious objector hearing officer of the Department of Justice, contrary to the earlier Regulations that stood for over ten years providing for the inclusion of the report in the draft board file, which had been approved by Congress in the enactment and re-enactment of the draft law, and the exclusion of which also denied petitioner due process of law before the appeal board.

III.

Whether the petitioner was denied constitutional rights to a full and fair hearing guaranteed by the Fifth Amendment in the District Court when the trial court refused to compel the production of the formal typewritten and legally required report of the hearing officer, on the second processing, to the Department of Justice at Washington, D. C., concerning the hearing conducted by him, and in quashing the subpoena *duces tecum* calling for the production of such document, which was material and relevant and was needed by the petitioner at the trial to prove that he had been denied procedural due process of law in the Department of Justice hearing by failure of the hearing officer to call to his attention that the Department of Justice was relying upon an alleged exaggeration of the hours devoted by petitioner to his ministry.

IV.

Whether the petitioner was denied constitutional rights to a full and fair hearing guaranteed by the Fifth Amendment in the District Court when the trial court refused to compel the production of the original FBI reports and quashed the subpoenas *duces tecum* calling for the production of such reports, which were shown to be material and relevant because petitioner needed them to prove the defenses urged by him that he was denied procedural due process of law before the appeal board by the failure of the Department of Justice to make an accurate summary of the original FBI reports, and thereby (1) withheld from the appeal board evidence favorable to his conscientious objector claim impeaching the adverse recommendation to the appeal board and (2) summarized the unfavorable evidence so as to take it out of context and give it a warped meaning adverse to the conscientious objector claim of petitioner.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States is involved in this case. It provides:

> "No person shall * * * be deprived of life, liberty, or property without due process of law * * *."

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations here involved are so lengthy that they are printed, *infra*, pp. 80-86, as Appendix A.

STATEMENT OF THE CASE

This Court granted the writ of certiorari on November 23, 1959, to review the judgment of the United States Court of Appeals for the Tenth Circuit, which affirmed a judgment of the United States District Court for the District of Colorado imprisoning petitioner in the custody of the Attorney General for a period of 15 months for an alleged violation of the Universal Military Training and Service Act. [R. 15, 194, 195]

Petitioner was indicted for refusal to submit to induction into the armed forces on June 24, 1957, at Denver, Colorado. [R. 4-5] He pleaded not guilty and consented to a trial to the District Court without a jury. [R. 7] Evidence was heard and upon trial the court admitted into evidence the entire draft board file. [R. 19-121]

Before trial petitioner subpoenaed the production of the official typewritten reports of the hearing officers, Fred M. Mazzula and Maurice A. Evensen.[2] [R. 8-11] Petitioner also subpoenaed Herbert M. Boyle, Assistant United States Attorney, and Scott J. Werner, FBI Special Agent in Charge of the Denver office, to produce the original FBI reports made by agents as a part of the inquiry conducted pursuant to Section 6(j) of the Act. [R. 11-12]

The Government made a written motion to quash the subpoenas commanding the production of the FBI reports. [R. 12] The written motion was amended orally to include also the reports of the hearing officers of the Department of Justice. [R. 20-22] While the trial judge entertained the motion to quash before evidence was heard, both the subpoenas *duces tecum* and the motion to quash were continued until "the matters come up" when they were ruled on. [R. 23]

Petitioner registered with Local Board No. 9, Boulder, Colorado, on March 17, 1952. [F. 1A[3]; R. 127] His questionnaire showed that he was a minister of Jehovah's Witnesses and employed by a sugar producer at Longmont, Colorado. [F. 3, 3A; R. 131, 132] He was mailed a conscientious objector form, which was completed and returned to the local board. [F. 13, 13A, 14, 14A, 15; R. 151-155]

Petitioner claimed classification as a minister of religion then because he was devoting, in October, 1952, a minimum of 100 hours a month to preaching. [F. 6; R. 137] Petitioner was classified as liable for service and put in Class I-A. [F. 5A; R. 29, 136] He had a hearing, was processed through the Department of Justice and the appeal board, winding up with a I-A and an order to report for induction, which he disobeyed.[4] He was not prosecuted but his case was reopened because of the illegal recommendation of the

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[2] The subpoena upon Mazzula is not involved because the case was reprocessed after the first order of delinquency was withdrawn.

[3] Figures appearing herein within brackets and preceded by "F." refer to page numbers in longhand located at the lower right corner of the pages of the draft board file, Plaintiff's Exhibit 1.

[4] [F. 5A, 10-12, 19A-B, 20-20B, 21A, 22-22A, 23, 24-24A 26; R. 29-32, 73-81, 136, 146-150, 158-160, 161, 162-164]

Department of Justice on theocratic warfare.—See *Sicurella v. United States*, 348 U.S. 385 (1955). [F. 26A, 29, 29A, 30, 31A; R. 168-169]

Petitioner was reclassified I-A by the local board. [F. 5A, 32A; R. 136, 170] Petitioner had a personal appearance but was denied the right to offer new and additional evidence. The local board said: "We have heard all that before, and besides we have our minds made up in this case. If there is anything you would like to do we will have to refer you to the Appeal Board." [R. 86] He was in the building less than five minutes. [R. 86, 97]

The local board prepared a lengthy unsigned false summary of the hearing. It was improbable that petitioner said everything summarized in the memorandum in the four or five minutes he was at the board office. [F. 34A; R. 173] Petitioner testified that he was then only a part-time minister devoting only about 20-25 hours a week to study and preparation but that he averaged only 6½ hours a month to his missionary work and that long before he had quit the full-time ministry. [R. 104-105] The papers in the draft board file at the time of hearing also showed this. [F. 23A, 25; R. 93-94, 99, 165, 166]

Petitioner testified that he did not tell the board he was averaging 100 hours a month and that he did not even get a chance to say anything about his ministry when before the board for only about four minutes. [R. 86, 93-94, 99] The first three paragraphs of the memorandum made by the local board about the personal appearance on August 17, 1956, are substantially true about what happened at the board. But the fourth paragraph of the memorandum prepared by the local board of the August, 1956, hearing is false. [F. 34A; R. 173]

That paragraph is nothing but a mere word-for-word copying of an earlier letter dated November 22, 1952, written to the local board by the petitioner when he was a full-time pioneer minister four years earlier. [F. 5A, 10-12, 23A, 25, 39A; R. 136, 146-150, 165, 166, 180] The two are identical: (1) the letter and (2) the fourth paragraph of the memorandum.[5]

Petitioner testified that the first time he saw the memorandum (footnote 5, *infra*) was after the indictment was returned against him. [R. 100-101]

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[5] **Fourth Paragraph of August 17, 1956 Memorandum of Local Board:**	**Second, Third and Fourth Paragraphs of November 22, 1952 Letter from Gonzales:**
"Mr. Gonzales stated: " 'I am a regular minister as defined under section 16 G part II of the laws and regulations set out by Selective Service Act of 1948. At present I am devoting an average of 100 hours a month to actual preaching publicly and from house to house, and an additional 50-75 hours in preparation for ministerial duties such as; preparation for home Bible studies; calling back on good-will persons, attending congregational meetings, as well as training students to become ministers. I also serve as Stock Servant for the local congregation. As you perhaps already know that the Selective Service National Headquarters has determined that Jehovah's Witnesses and Watchtower Bible and Tract Society constitues [sic] a recognized religious organization and that all Jehovah's Witnesses who are regularly and customarily teaching and preaching the doctrines and principles of the Bible as advocated by Jehovah's Witnesses as a vocation and not incidentally are entitled to exemption as ministers of religion. These are some of the reasons I request a 4-D classification, so I would like for you to further consider my case as a minister of the gospel or *would like to appear in person* before the local board members for further consideration or discussion in regard to my case.' " [Italics supplied] [F. 34A; R. 173]	"I am a regular minister as defined under section 16 G part II of the laws and regulations set out by Selective Service Act of 1948. At present I am devoting an average of 100 hours a month to actual preaching publicly and from house to house, and an additional 50-75 hours in preparation for ministerial duties such as; preparation for home Bible studies; calling back on good-will persons, attending congregational meetings, as well as training students to become ministers. I also serve as Stock Servant for the local congregation. [¶] As you perhaps already know that the Selective Service National Headquarters has determined that Jehovah's Witnesses and the Watchtower Bible and Tract Society constitute a recognized religious organization and that all of Jehovah's Witnesses who are regularly and customarily teaching and preaching the doctrines and principles of the Bible as advocated by Jehovah's Witnesses as a vocation and not incidentally are entitled to exemption as ministers of religion. [¶] The foregoing statements are some of the reasons why I request a IV-D classification. So I would like for you to further consider my case as a minister of the Gospel or would like to appear in person before the local board members for further consideration or discussion in regard to my case." [F. 10-10A; R. 146-147]

The I-A classification was not changed and his file and the memorandum above referred to (of which the petitioner had no notice) were forwarded to the appeal board. [F. 5A, 35C; R. 136) The file was then referred to the Department of Justice for inquiry and hearing. [R. 32]

The original report of the FBI, a résumé thereof and the draft board file were forwarded to the hearing officer, Evensen. [R. 60, 65] A copy of the résumé of the FBI inquiry was sent to petitioner and he was notified to appear for hearing. [R. 46, 66, 101] The résumé did not summarize the favorable evidence gathered by the FBI.[6] Petitioner appeared before hearing officer Evensen at Pueblo, Colorado, with two witnesses on January 7, 1957. [R. 44-45, 86-87] Evensen testified he could not remember discussing with petitioner the alleged exaggeration of the number of hours that he was then devoting to the ministry, as shown in the memorandum of the local board appearing above in footnote 5. [R. 46-47; 60-61] Petitioner testified Evensen did not say anything about it. [R. 92-95, 104-105, 109-110]

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[6] "* * * He is regarded as an excellent worker, completely reliable, dependable and of excellent morals, character and associates. * * *

"Registrant's employer, acquaintances, neighbors and religious associates all spoke favorably concerning registrant's character and reputation, conduct and morals. * * *

"The Congregational Servant of the group the registrant is affiliated with added that registrant spends 20 to 25 hours each week in church activity or preparation for study groups. * * * This record reflects that for the period from September 1954 through September 1956, registrant has devoted an average of approximately six and one-half hours per month to preaching to the public. * * *" [F. 38A; R. 178]

The résumé then refers to an arrest of the petitioner, his being photographed and fingerprinted because of a complaint made against him as the result of mistaken identity for another man who had made obscene remarks to a woman. [F. 39; R. 179] The résumé then concludes:

"The clerk of the Watchtower Bible and Tract Society at Brooklyn, New York, advised that a re-check of the records of this organization from the information available failed to reflect any additional information pertaining to the registrant other than that previously furnished in September 1953. He said the registrant is not on the current Pioneer list." [F. 39, 39A; R. 179, 180]

The résumé of the original inquiry prepared in 1954, referred to in the above résumé, states in part as follows:

"A School Servant and Record Clerk of the Watchtower Bible and Tract Society of Brooklyn, New York, advised that the registrant was ordained a Jehovah's Witnesses minister on April 3, 1949 and that he became a full Pioneer on October 1, 1952, serving in that capacity until April 1, 1953. * * * The Servant explained, in view of the amount of work being handled by the registrant, he no longer is a Pioneer and is not devoting 100 hours per month in Kingdom preaching and that he has relinquished his position as a Bible Study Servant." [F. 23A; R. 165]

Gonzales and his two witnesses testified. [F. 37-37A; R. 86-89, 175-176] Before Gonzales left he informed the hearing officer that he wanted to talk about the incident referred to in the résumé about his having been taken to the police station on April 13, 1956. [F. 39-39A; R. 89-91, 179-180]

The hearing officer, Evensen, made longhand notes at the hearing which he used in preparing his typewritten report on the hearing, five pages long. [R. 64-67, 68] The hearing officer also had the original FBI reports and used information obtained from them. [R. 66-67] The hearing officer's report, the FBI reports and the draft board file were forwarded to the Department of Justice. [R. 46, 64-67, 68-69] The Department of Justice, upon receipt of the hearing officer's report, reviewed it together with the original FBI reports from which the résumé had been made. [F. 36A-38; R. 174-177]

The Department of Justice stated to the appeal board that (1) the hearing officer found petitioner had "the appearance of being sincere and firm in his beliefs and that he appeared to be well versed in the scriptures" and (2) the hearing officer found petitioner's objections were based upon religious training and belief. [F. 37A; R. 176]

The recommendation of the Department of Justice to the appeal board, however, concluded as follows:

"On the other hand the registrant's claim as to the amount of his religious activities is so highly exaggerated, if we are to believe the official records of his religious organization as reported in the resume and recapitulated above, as to cast doubt upon his veracity and, consequently, upon his sincerity and good faith. Therefore, with due regard for the Hearing Officer's recommendation, the Department of Justice finds that the registrant's claim is not sustained. Accordingly, it is recommended to your Board that registrant's claim be not sustained." [F. 38; R. 177]

The recommendation was forwarded to the appeal board. This was done without prior notice to the petitioner to answer the above statement about exaggeration in the Department. Petitioner had no opportunity to answer the local board memorandum relied upon before the departmental recommendation was mailed. [F. 41; R. 182]

After the appeal board received and considered the recommendation it, for the first time, was forwarded to petitioner, months after his hearing in Pueblo, Colorado. The change of petitioner from devoting 100 hours to only 6½ hours had been noted by the Department of Justice as early as February 1, 1954, three years before its false recommendation. [F. 22-23A; R. 162-165][7]

Petitioner answered the false recommendation (of which the Department had not given him timely notice) informing the appeal board that: (1) he did not inform the local board on August 17, 1956, he was serving 100 hours a month in public preaching; (2) the only time he submitted such information was when he was a full-time minister, from October 1, 1952, to April 1, 1953; and (3) he did not tell the local board in August, 1956, that he was stock servant, his status when he previously lived at Longmont, Colorado.

In this letter he also stated that he in no manner exaggerated his report about time devoted to the ministry —6½ hours per month—as such would be a lie and he was fully aware of the consequences to liars under the law of God. [F. 41; R. 182]

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[7] The résumé of the FBI reports that accompanied the first recommendation dated February 1, 1954 [F. 22, 22A, 23, 23A; R. 162-165], showed that petitioner stopped the full-time ministry and was not "devoting 100 hours per month" to the ministry after April 1, 1953. The record shows that the local board had notice of this information before August 17, 1956, when, at the personal appearance which lasted only four minutes, it denied petitioner his ministerial status and illegally apparently copied as a false summary of the August 17, 1956, hearing the second, third and fourth paragraphs of the letter written by petitioner on November 22, 1952, to the local board requesting a personal appearance. [F. 10-10A, 34A; R. 146-147, 173]

On May 2, 1957, the appeal board disregarded the letter and classified him I-A as recommended by the Department of Justice. [F. 5A, 42; R. 136] Petitioner was notified of such classification. [F. 5A, 42A; R. 136]

On June 3, 1957, petitioner was ordered to report for induction on June 24, 1957. [F. 5A, 43; R. 136] On June 24, 1957, he reported for, but admittedly refused to submit to, induction into the armed forces. [F. 45A, 48; R. 43, 185]

Maurice A. Evensen, the hearing officer, was subpoenaed and was called as a witness by the petitioner (1) to show that at the hearing nothing was said about the exaggeration; (2) to produce the typewritten report of the hearing [R. 9-10, 44-45, 46-50] and (3) to show that the report of the hearing was favorable in many respects to petitioner's claim and that this favorable report of testimony was kept out of the record and withheld from the appeal board. [R. 52-55, 57-59, 60-62]

The court sustained the objections of the Government but ruled that the witness could use the report to refresh his memory. [R. 55-56, 61-62] Evensen stated a need for the typewritten report to refresh his memory but after the noon recess in the trial court he said he did not. [R. 56-57, 60-63] Petitioner contended he was denied procedural due process of law contrary to the Fifth Amendment and he was denied the right to develop his defenses. [R. 61-63] The trial court was requested to reconsider its ruling excluding the report, a vital procedural link in petitioner's case. [R. 67-68] The court refused. [R. 67-68]

Evensen then stated that he had no independent recollection. [R. 67-69] Demand for the report to refresh the memory was refused. [R. 68-70]

Scott J. Werner, FBI Special Agent in Charge of the Denver office, was subpoenaed and called to produce the FBI reports. [R. 11-12, 81] The original FBI reports had been used by the Department of Justice in its recommendation on petitioner's conscientious objections. [R. 65-68] The FBI reports were needed to show that the résumé withheld favorable evidence supporting petitioner's claim as a conscientious objector and to compare the original reports with the résumé to show the denial of procedural due process. [R. 82-84] The court sustained the objection to the evidence and also the motion to quash the subpoenas *duces tecum.* [R. 83-84] The court refused to reconsider the ruling as requested because petitioner had been denied procedural due process by the District Court. [R. 83-84]

At the close of all of the evidence petitioner made a motion for judgment of acquittal.[8] [R. 111-114] The motion for judgment of acquittal was denied. [R. 114-117] Reasons were stated for the denial. [R. 114-118] The court found the petitioner guilty and made findings of fact. [R. 14, 118-120] Judgment of conviction was entered. [R. 15] Petitioner duly appealed to the Court of Appeals. [R. 16, 119-120] The Court of Appeals affirmed. [R. 193, 194] The time for filing a petition for writ of certiorari was extended to September 25, 1959, and the petition was timely filed in this Court. [R. 195]

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[8] In ground 4 of the motion it was contended that petitioner had been denied procedural due process of law because the Department of Justice had failed to give the petitioner an opportunity by notice in advance of the adverse recommendation to answer and explain the position taken by the Department of Justice against petitioner on his conscientious objector claim because of alleged exaggeration of the number of hours devoted to the ministry. [R. 112]

In ground 5 of the motion petitioner contended that the Department of Justice denied him procedural due process of law before the appeal board because it had withheld favorable evidence showing the sincerity of the petitioner's claim for classification as a conscientious objector. [R. 112-113]

Petitioner in ground 6 contended that Section 1626.25 of the Selective Service Regulations (*infra*, page 84) that deleted the report of the hearing officer from the draft board file and provided only for the final recommendation of the Department of Justice without including such report of the hearing officer was void because contrary to the Act which had re-enacted and made a part of the law a ten-year-old Regulation providing for the inclusion of the hearing officer's report in the file. [R. 113]

Also, in ground 7 of the motion for judgment of acquittal petitioner contended that the withholding of the report of the hearing officer from the appeal board denied him a full and fair hearing upon his conscientious objector claim in the appeal board. [R. 113]

SUMMARY OF ARGUMENT

ONE

The Department of Justice denied petitioner procedural due process of law in the proceedings in the Department of Justice by not giving petitioner timely opportunity, before the final recommendation by the Department of Justice was made to the appeal board, to answer facts appearing in a false memorandum prepared by the local board and placed in the draft board file without notice to petitioner and relied upon by the Department of Justice in its recommendation to the appeal board without prior notice to petitioner, to the effect that petitioner had exaggerated the number of hours devoted to preaching and the number of hours devoted to preparation for the ministry, all contrary to the "fair and just" provisions of the Act and the Due Process Clause of the Fifth Amendment to the United States Constitution.

Reliance upon the false memorandum of the local board by the Department of Justice without first giving petitioner an opportunity to answer it in the Department was a denial of procedural due process of law. (*Simmons* v. *United States,* 348 U. S. 397, 404-406 (1955)) The recommendation without petitioner having a prior opportunity to explain the false memorandum constituted a break in the chain of proceedings. (*Sicurella* v. *United States,* 348 U. S. 385, 391-392 (1955)) Since there was no memorandum made by the appeal board stating the reasons for the denial of the conscientious objector status it must be presumed that the appeal board action was based on the departmental recommendation. (*Sicurella* v. *United States,* 348 U. S. 385 (1955)); *Ypparila* v. *United States,* 219 F. 2d 465, 469 (10th Cir. 1954)) That petitioner had an opportunity to answer the adverse recommendation sent to the appeal board after it was received by the appeal board and before the final classification did not cure the denial of a full and fair hearing in the Department of Justice.—*Manke* v. *United States,* 259 F. 2d 518, 522-524 (4th Cir. 1958); compare *Gonzales* v. *United States,* 348 U.S. 407 (1955).

The burden was upon the Government to show affirmatively by proof from the draft board file that the appeal board did not rely upon the false memorandum of the local board.—*Steele* v. *United States,* 240 F. 2d 142 (1st Cir. 1956).

It is submitted that there was a denial of procedural due process of law in the Department of Justice proceedings, contrary to the "fair and just" provisions of the Act and the Fifth Amendment to the United States Constitution.

TWO

Petitioner was denied procedural due process of law by the Department of Justice excluding from the draft board file the report of the Department of Justice hearing officer, pursuant to Section 1626.25 of the Selective Service Regulations (32 C.F.R. § 1626.25), contrary to the provision of earlier Regulations that stood for over ten years and was in existence at the time of the enactment and re-enactment of the present law, which provided for the inclusion in the draft board file of the hearing officer's report rather than merely referring to it, as was done in this case in the recommendation of the Department of Justice to the appeal board, and which said exclusion of the report from the file also denied petitioner a full and fair hearing and due process of law before the appeal board, contrary to the "fair and just" provisions of the Act and the Fifth Amendment to the United States Constitution.

For a period of over ten years under the 1940 Act and the 1948 Act the Regulations prescribed for the inclusion in the draft board file of "both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

(E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, as amended by E. O. 10292, 16 F. R. 9862, Sept. 28, 1951, 32 C. F. R. § 1626.25 (1951).) The enactment of the Universal Military Training and Service Act (65 Stat. 75, 83 (1951); 50 U. S. C. App. § 456(j) (1952)), while the Regulation was outstanding, constituted congressional approval and adoption of the procedure of the Department of Justice and the Selective Service System, which included the hearing officer's report in the draft board file.—*Sterrett* v. *United States*, 216 F. 2d 659 (9th Cir. 1954); *Billings* v. *Truesdell*, 321 U. S. 542 (1944).

Section 1626.25(c), as amended on June 17, 1952 (E. O. 10363), providing for placing only the letter of the Department of Justice in the draft board file, and which fails to provide for putting the report of the hearing officer in the file, is void because it is in conflict with the intent of Congress expressed implicitly in the adoption of the Universal Military Training and Service Act while the old Regulation was outstanding, which required placement in the draft board file of the hearing officer's report.—*Sterrett* v. *United States*, 216 F. 2d 659 (9th Cir. 1954); *Billings* v. *Truesdell*, 321 U. S. 542 (1944).

It is a denial of procedural due process of law—even if this Court says Congress intended otherwise—to fail to include the report of the hearing officer in the draft board file, because the petitioner was not notified timely of the position taken by the Department of Justice.—*Mazza* v. *Cavicchia*, 15 N. J. 498, 105 A. 2d 545 (1954) (approved in *Gonzales* v. *United States*, 348 U. S. 407, 412 (1955)).

It should be held by this Court that the part of Section 1626.25 of the Regulations (32 C. F. R. § 1626.25), which provides for the exclusion of the hearing officer's report from the file, is void because it conflicts with the congressional intent to include the report in the file and that the exclusion constitutes a denial of procedural due process of law contrary to the "fair and just" provisions of the Act and the Fifth Amendment to the United States Constitution.

THREE

Petitioner was denied his right to a full and fair hearing in the District Court contrary to the Fifth Amendment when the trial court quashed the subpoena *duces tecum* calling for the production of the formal typewritten and legally required report of the hearing officer concerning the hearing conducted by him and attended by petitioner and his witnesses, which was material and relevant and needed by petitioner at the trial to prove that the hearing officer denied petitioner procedural due process and did not conduct a full and fair hearing required by law.

The report of the hearing officer was shown to be material and relevant at the trial (1) because petitioner needed it to show that the hearing officer failed to inform him of the intent of the Department of Justice to rely upon the false memorandum, (2) because petitioner desired to show that the hearing officer illegally withheld favorable evidence given by the petitioner and his witnesses from the Department of Justice and the appeal board, (3) because petitioner needed the report to show that he was denied a full and fair hearing and (4) because petitioner needed it to impeach the hearing officer who was called as an adverse witness in the District Court.

The oral hearing conducted by the Department of Justice is a vital link in the chain of the administrative proceedings, especially when the appeal board accepts—as it did in this case—the recommendation of the Department of Justice. (*Sicurella* v. *United States*, 348 U. S. 385 (1955); *Simmons* v. *United States*, 348 U. S. 397 (1955); *United States* v. *Romano*, 103 F. Supp. 597 (S.D. N.Y. 1952)) The denial of procedural due process at the oral hearing by the hearing officer constituted a break in the link of proceedings. (*Simmons* v. *United States*, 348 U.S. 397 (1955)) The typewritten report of the hearing officer, required to be made by the regulations of the Department of Justice, was properly subpoenaed at the trial, and production thereof should have been compelled by the trial court so that petitioner could establish the denial of procedural due process of law in the proceedings conducted by the Department of Justice.

The "Jencks statute" (71 Stat. 595 (1957), 18 U.S.C. § 3500 (1958)), does not preclude the compulsory production of the report of the hearing officer at the trial. (*Palermo* v. *United States*, 360 U. S. 343, 360-366 (1959)) It is mere speculation to suggest that the hearing officer's report is immaterial. The reason it cannot be said to be immaterial upon the record made in the trial court is that the document was not excluded from the evidence but the subpoena commanding the production of the document was quashed, thus making it impossible to see the document.—*Gordon* v. *United States*, 344 U. S. 414, 418-420 (1953).

This Court should hold that the trial court committed reversible error in quashing the subpoena and refusing to compel the production of the typewritten report of the hearing officer.

FOUR

Petitioner was denied a full and fair hearing in the District Court, contrary to the Fifth Amendment, when the trial court quashed the subpoenas *duces tecum* calling for the production of the FBI investigative reports used by the Department of Justice in conducting the hearing, making a report thereon and in making the recommendation to the appeal board, which documents were needed by petitioner to prove his defense that the Department of Justice had withheld favorable evidence from the appeal board and summarized the unfavorable evidence out of context and with a warped meaning, misleading the appeal board.

This Court has been requested to pass upon this question in eleven other cases that were presented in several petitions for writ of certiorari. The Court had an opportunity to determine the question in both *United States* v.

Nugent, 346 U. S. 1 (1953); and *Simmons* v. *United States*, 348 U. S. 397 (1955). The Court failed to pass upon the question. The question is of great and wide national importance in the administration of the criminal sanctions clause of the draft act. Regardless of how the Court decides questions I, II and III urged, *supra*, pages 2-3, it is suggested that the Court ought not to avoid a decision this time, as has been done many times in the past. The Court should decide the question now so as to settle the law once and for all.

Congress did not intend that the résumé of the inquiry conducted by the FBI should contain only a summarization of the unfavorable evidence. It was the intent of Congress to supply all of the evidence by a résumé of the favorable evidence as well as the unfavorable evidence.—*White* v. *United States*, 215 F. 2d 782 (9th Cir. 1954); *Sterrett* v. *United States*, 216 F. 2d 659 (9th Cir. 1954).

The failure of the Department of Justice to summarize the favorable evidence in this case constituted a withholding of evidence from the appeal board and from the petitioner upon his sincerity as a conscientious objector and is a denial of procedural due process. The petitioner needed the original FBI reports to compare them with the résumé provided by the Department of Justice so as to develop his defense that there has been a denial of procedural due process of law before the appeal board by the Department of Justice by withholding the favorable evidence.

Petitioner also needed the original FBI reports to establish that the adverse evidence had been presented to the appeal board in an unfair manner because it was taken out of context and slanted so as to give a false meaning to the appeal board because of bias and prejudice against petitioner as a conscientious objector.

It was vital to the rights of the petitioner for him to show he was sincere, as may be shown by an equal number of persons, if not by a preponderance of the witnesses who gave statements to the FBI during the "inquiry" under the

Act. Petitioner needed the FBI reports to show that the résumé falsely indicated that the majority of persons interviewed under the Act (62 Stat. 609 (1948), 65 Stat. 83 (1951), 50 U. S. C. App. § 456(j) (1952)), were adverse to petitioner. Petitioner and the appeal board needed to know the number of witnesses who testified *pro* and *con* about his sincerity as a conscientious objector.

The 1951 Act (65 Stat. 75, *et seq.*) and the 1948 Act (62 Stat. 604, *et seq.*) were based upon the 1940 Act (54 Stat. 885, *et seq.*). Senate Report No. 2002, p. 9, August 5, 1940, on Senate Bill 4164 provided that the inquiry and hearing be "fair both to a person holding conscientious" objections and "to the Nation." The report said that Congress intended that the rights of the registrant be "fully protected" against illegal measures. The inquiry and hearing were provided for in the Department of Justice so as to bring "new factors" in the inquiry "to light."—*Conscientious Objection*, Special Monograph No. 11, Vol. I, pages 82, 126, 150, 155.

New factors—the term used in the report—are not brought to "light" when the favorable evidence is withheld by the résumé and when only the unfavorable "factors" are summarized by the Department of Justice, as was done in this case. The FBI reports were needed at the trial to establish that there was such a denial of procedural due process of law before the appeal board.

During the debates in Congress on the bill that became the 1948 Act, Senator Gurney said, among other things: "What we are after really are the facts, and the Department of Justice has always shown itself perfectly capable of uncovering the facts." (94 Cong. Rec. 7306) The "facts" are established only by a consideration of both the favorable and the unfavorable evidence. Whether the facts have been developed depends upon a comparison of the résumé with the FBI report.

The provision in the Act made applicable Section 3 of the Administrative Procedure Act (60 Stat. 238 (1946), 5 U. S. C. § 1002), making the draft board and departmental papers "matters of official record * * * available to persons properly and directly concerned." This required that the favorable as well as the unfavorable evidence in the original FBI reports be fully summarized in the résumé and also produced at the trial to determine whether the Department of Justice has properly discharged its function under Section 6(j) of the Act.

The "fair and just" provisions of the 1940, 1948 and 1951 Acts (54 Stat. 885, 62 Stat. 604, 65 Stat. 75) all required the full and fair summarization of all of the evidence—both favorable and unfavorable—gathered by the inquiry under the Act (62 Stat. 609 (1948), 65 Stat. 83 (1951), 50 U.S.C. App. § 456(j)(1952)) by the Department of Justice. Silence of Congress, of the general public and of the witnesses that appeared before the congressional committees about the illegal procedure of the Department of Justice in withholding all of the evidence gathered by the inquiry under the Act does not constitute approval of the denial of procedural due process practiced by the Department of Justice. —*Girouard* v. *United States,* 328 U. S. 61, 69-70 (1946); *Helvering* v. *Hallock,* 309 U. S. 106, 119 (1940).

The various holdings of the courts quashing subpoenas *duces tecum* calling for the production of the FBI reports are based upon an erroneous interpretation of *United States* v. *Nugent,* 346 U.S. 1 (1953). That case dealt only with the question of whether the full FBI report should be produced at the administrative level and did not pass upon the question of whether the original FBI report could be subpoenaed in the United States District Courts for the purpose of proving a denial of procedural due process of law.

While a question of the subpoena of the FBI report was raised in *United States* v. *Nugent,* 346 U. S. 1 (1953), it was not determined by this Court. It was later avoided by this Court in *Simmons* v. *United States,* 348 U. S. 397 (1955). The cases (*Blalock* v. *United States,* 247 F. 2d 615 (4th Cir. 1957); *Bouziden* v. *United States,* 251 F. 2d 728

(10th Cir. 1958); *Gonzales* v. *United States* 269 F. 2d 613 (10th Cir. 1959)) are bottomed upon a misinterpretation of *Nugent* (346 U. S. 1) that this Court held the résumé of the inquiry pertained only to the unfavorable evidence and that the résumé need not show the favorable evidence gathered by the FBI as a part of the inquiry under the Act.

United States v. *Nugent*, 346 U. S. 1 (1953), involved only production of the FBI report at the administrative level. This was asked for the purpose of using it in the administrative proceedings to determine whether all the unfavorable evidence was supplied to the registrant at or before the hearing in the Department of Justice. While the argument was made in *Nugent* that the report was also needed in the trial court to show a failure to supply the favorable evidence, this Court did not talk about the point and did not expressly say that the résumé need not contain a summary of the favorable evidence. Previous to the gratuitous suggestion of this Court in *United States* v. *Nugent*, 346 U. S. 1, 6 (1953), there were no provisions in the Department of Justice for the making of any sort of résumé of any evidence appearing in the FBI reports.—Compare *United States* v. *Nugent*, 346 U. S. 1 (1953), with *Simmons* v. *United States*, 348 U. S. 397 (1955).

Blalock v. *United States*, 247 F. 2d 615 (4th Cir. 1957), is based solely upon the erroneous assumption that this Court held in *Nugent* (346 U. S. 1), that the FBI report was not available at the trial and also that the résumé in the administrative proceedings need cover only the adverse evidence appearing in the original FBI report.

The résumé supplied to petitioner in this case does not even purport to summarize the favorable evidence. Over two-thirds of the summary of all the evidence in the résumé is taken up with a summary of the adverse evidence. The favorable evidence is merely referred to incidentally in the résumé without any sort of summary of the favorable evidence appearing in the original FBI report being made. There was obviously a withholding of the favorable evidence from petitioner and also from the appeal board by the inadequate résumé.

This could be established at the trial only by the compulsory production of the original FBI reports as subpoenaed by petitioner.

It cannot be said that the FBI reports are immaterial because the recommendation of the Department of Justice does not refer to or adopt any of the unfavorable evidence, and the adverse recommendation is not grounded upon the insufficiency of or the absence of favorable evidence. It is the prerogative of petitioner himself and of him alone in the trial to determine whether any favorable evidence has been withheld so as to deny procedural due process. This can be determined only by a comparison of the original FBI "secret police" reports with the summary of the evidence appearing in the résumé. *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957), confesses that whether the résumé shown in the file contains an unfair summary of the inquiry can be determined only by a comparison of the FBI report with the summary.—247 F. 2d at page 620.

This Court should hold that due process of law in the trial court in prosecutions of conscientious objectors under the draft law requires that the trial court compel the production of the FBI report in the same manner as it has been required in criminal prosecutions of gangsters and seditionists.—*United States* v. *Andolschek*, 142 F. 2d 503 (2d Cir. 1944); *United States* v. *Beekman*, 155 F. 2d 580 (2d Cir. 1946); *United States* v. *Reynolds*, 345 U. S. 1 (1953); *Jencks* v. *United States*, 353 U. S. 657 (1957); *Palermo* v. *United States*, 360 U. S. 343, 360-366 (1959).

The trial court committed reversible error in quashing the subpoenas *duces tecum* of the supplemental inquiry commanding the production of the FBI reports needed for the purpose of proving the defense that there was a denial of procedural due process of law before the appeal board by the Department of Justice in making an unfair summary of the inquiry in the résumé placed in the draft board file.

FIVE

In the event the Court concludes that *United States* v. *Nugent*, 346 U. S. 1 (1953), keeps petitioner from obtaining the use of the original FBI reports at his trial under the indictment, then this Court is requested to overrule and set aside *United States* v. *Nugent*, 346 U. S. 1 (1953), because it was erroneously decided and it does not correctly interpret and apply the Act or the Fifth Amendment to the United States Constitution.

United States v. *Nugent*, 346 U. S. 1 (1953), is based upon three unsound holdings: (1) that there is a "litigious interruption," (2) that the production of the FBI report amounts to a "full-scale trial" in the Department of Justice and (3) that the hearing in the Department of Justice is simulated to a "legislative hearing" or to a consideration of a probation report after a conviction in a criminal case.

The underlying fault of *United States* v. *Nugent*, 346 U. S. 1 (1953), is the total failure of the Court to give any reason of national security or any other plausible reason why this Court justifies the withholding of the FBI report of the "inquiry" required under the Act.

The principle of *Jencks* v. *United States*, 353 U. S. 657 (1957), has been made applicable to federal administrative proceedings by many lower court decisions. *United States* v. *Nugent*, 346 U. S. 1 (1953), making the principle inapplicable to conscientious objector hearings in the Department of Justice under the Act, is out of harmony with due process of law guaranteed by the Constitution and the "fair and just" provisions of the Act.

In event it is concluded that *United States* v. *Nugent*, 346 U. S. 1 (1953), actually held that the summary appearing in the résumé should be confined only to the adverse evidence, then it is suggested that such holding by this Court is erroneous. The reason is that the holding is in conflict with the intent of Congress to allow favorable as well as unfavorable evidence to be summarized by the Department of Justice.

United States v. *Nugent*, 346 U. S. 1 (1953), is erroneous in simulating the hearing in the Department of Justice to the legislative hearing involved in *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294 (1933), and the pre-sentence investigation involved in *Williams* v. *New York*, 337 U. S. 241 (1949).—See what the Court said *Gonzales* v. *United States*, 348 U. S. 407, 412 (footnote 4) (1955).

Congress intended under the 1940, 1948 and 1951 Acts that conscientious objectors be dealt with in harmony with the traditional national policy to be "fair and just" to such objectors. Congress did not intend to treat them as criminals awaiting a pre-sentence report. Congress did not intend that the summary should be made as though the "inquiry" was a search for law violators or draft evaders. Persons providing information about conscientious objectors are not regarded the same as informers in criminal cases whose lives are endangered by identification.

It is necessary to have the witnesses identified by their names in order to enable the conscientious objector to answer the adverse evidence and also to make use of the favorable evidence appearing in the original report. The value of information provided to the FBI and summarized by it in each case depends—and this is important—upon the opportunity of the secret FBI informant to know the facts. The basis of such knowledge can be known only through identification. Identification comes only through a disclosure of the name of each informant.

This Court in *United States* v. *Nugent*, 346 U. S. 1, 9-10 (1953), made a mistake when it simulated the disclosure of the original FBI report to a "full-scale trial." Disclosure of the original report at the hearing takes only a few minutes. The answer by the registrant takes only a few minutes. The present departmental and appeal board procedure each allow the registrant 30 days in which to answer (1) the résumé and (2) the final recommendation. Certainly a few minutes granted as a favor at the hearing allowing the registrant to see the original FBI report would not amount to a "full-scale trial" or "litigious interruption" comparable to the 30-day delay that is now granted by the Department of Justice and the appeal board in which to answer the résumé and the recommendation.

Disclosure of the full FBI report does not make the hearing similar to or equal to an adversary proceeding or a judicial trial. The provision for inquiry and hearing in the Act itself anticipates a reasonable delay in order to complete the investigation and to provide a "full and fair" hearing contemplated by the "fair and just" provisions of the Act.

The conscientious objector (by nondisclosure of the FBI report) is put at the mercy of persons who testify behind his back. The résumé of the FBI report is filled with hearsay without any means afforded to the conscientious objector to identify or answer informants who may hate or despise him.

The summary made in each résumé under the Act is usually glutted with conclusions, opinions, name-calling, slurs, rumors, malice and gossip. The FBI—and this is stated incidentally—takes statements from any kind or character of persons, including crooks or criminals, about anything, however remote or irrelevant. (Hoover, "The Confidential Nature of FBI Reports," 8 Syracuse Law Review 2, 3 (1956)) See the résumé used in a manner disgraceful to due process of law in *Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir. 1958). The hearing officer and the Department of Justice are influenced by the secret report appearing in the original FBI report to make an adverse recommendation. This is always based on the original FBI report. The Department uses the original report to make the final recommendation. The Department does not confine itself to the information appearing in the résumé only but uses the entire original secret FBI report which is not summarized.

The convenience of the Department to cater to the desire of informants not to identify themselves in the résumés is not sufficient justification for withholding the original FBI report in violation of the Fifth Amendment. The intent of Congress and of the authors of the Fifth Amendment is not complied with until the full FBI report is produced to the conscientious objector and placed in the draft board file for the use of the appeal board.

This Court should hold that *United States* v. *Nugent*, 346 U. S. 1 (1953), was erroneously decided. The Court should set aside and hold for nought the decision in *Nugent* (346 U. S. 1). The Court should interpret and apply the Act and the Constitution so as to compel the production of the original FBI report at the conscientious objector hearing in the Department of Justice.

ARGUMENT

ONE

The Department of Justice denied petitioner procedural due process of law in the proceedings in the Department of Justice by not giving petitioner timely opportunity, before the final recommendation by the Department of Justice was made to the appeal board, to answer facts appearing in a false memorandum prepared by the local board and placed in the draft board file without notice to petitioner and relied upon by the Department of Justice in its recommendation to the appeal board without prior notice to petitioner, to the effect that petitioner had exaggerated the number of hours devoted to preaching and the number of hours devoted to preparation for the ministry, all contrary to the "fair and just" provisions of the Act and the Due Process Clause of the Fifth Amendment to the United States Constitution.

This point was raised in point 3 of statement of points filed in the Court of Appeals [R. 1] It was presented to the trial court under ground 4 of the motion for judgment of acquittal. [R. 112] Both the trial court and the Court of Appeals overruled the point, which has been presented to this Court in the petition for writ of certiorari and here in this brief.

In the above statement of the case (*supra*, pages 6-7) petitioner has shown at great length how the local board, following the personal appearance on August 17, 1956, made a false memorandum that petitioner said he was doing full time ministry and not part-time ministry, as was the fact. The memorandum dated August 17, 1956, was a verbatim copying of his letter of November 22, 1952, requesting a personal appearance. See the statement of the case, *supra*, pages 6-7.

In the statement of the case (*supra*, pages 8-10) petitioner has also showed that the hearing officer did not raise the alleged exaggeration when the Department of Justice then intended to rely on it before the appeal board. [F. 36A-38; R. 47-48, 92-94, 104-105] The unfavorable recommendation of the Department of Justice was based upon this false memorandum. [F. 36A-38; R. 174-177]

This was a denial of procedural due process of law. Petitioner was denied an opportunity to answer it, contrary to *Simmons* v. *United States*, 348 U. S. 397, 404-406 (1955).[9] The courts have held that illegal proceedings in the Department of Justice under Section 6(j) of the Act and the Selective Service Regulations constitute a break in the chain of proceedings. (*United States* v. *Romano*, 103 F. Supp. 597 (S.D. N.Y. 1952)) This is especially so when there is a denial of a full and fair hearing by the hearing officer or by the Department of Justice or when the Department of Justice recommends to the appeal board contrary to law or contrary to fact.[10]

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[9] See also *United States* v. *Bouziden*, 108 F. Supp. 395, at 398 (W.D. Okla. 1952); *Brewer* v. *United States*, 211 F. 2d 864 (4th Cir. 1954); *Eagles* v. *United States ex rel. Samuels*, 329 U. S. 304, at 312-314 (1946); *United States ex rel. DeGraw* v. *Toon*, 151 F. 2d 778 (2d Cir. 1945); *United States ex rel. Levy* v. *Cain*, 149 F. 2d 338 (2d Cir. 1945); *United States* v. *Balogh*, 157 F. 2d 939 (2d Cir. 1946); judgment vacated, 329 U. S. 692 (1947); affirmed on other grounds, 160 F. 2d 999 (2d Cir. 147); cert. denied, 331 U. S. 837 (1947).

The courts have held that it must be presumed that the illegal recommendation was accepted by the appeal board and acted upon by it solely because of the adverse recommendation, especially when no memorandum is made specifying the reasons for the denial of the conscientious objector status. (*Sicurella* v. *United States,* 348 U. S. 385 (1955); *United States* v. *Hagaman,* 213 F. 2d 86, 89 (3rd Cir. 1954); *Ypparila* v. *United States,* 219 F. 2d 465, 469 (10th Cir. 1954))[11] The "fair and just" provisions of Section 1(c) of the Act (*infra,* page 80) demand that the illegal link in the departmental proceedings vitiate the chain of the Selective Service process.—*United States* v. *Romano,* 103 F. Supp. 597 (S.D. N.Y. 1952).

That it deals with a question of fact and not law is immaterial. See *Manke* v. *United States,* 259 F. 2d 518, at 522-524 (4th Cir. 1958), where notice of the adverse recommendation of the Department of Justice with an opportunity to answer before the appeal board was held to be of no consequence. Petitioner was entitled to get a full and fair hearing on the facts of his claim in the Department of Justice before the recommendation was made. The right to answer the recommendation long after it is received by the appeal board and considered by that board does not cure the denial of a full and fair hearing in the Department of Justice before the recommendation is made.

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[10] *Sicurella* v. *United States,* 348 U. S. 385, at 391-392 (1955); *Hinkle* v. *United States,* 216 F. 2d 8, at 9 (9th Cir. 1954) (cert. denied, 348 U. S. 970 (1955)); *Shepherd* v. *United States,* 217 F. 2d 942, at 944-946 (9th Cir. 1954) (on rehearing, 220 F. 2d 855, at 856 (1955)); *Clementino* v. *United States,* 216 F. 2d 10 (9th Cir. 1954); *Clark* v. *United States,* 217 F. 2d 511 (9th Cir. 1954) (on rehearing, 221 F. 2d 480 (9th Cir. 1955)); *Affeldt* v. *United States,* 218 F. 2d 112 (9th Cir. 1954); *Batelaan* v. *United States,* 217 F. 2d 946 (9th Cir. 1954); *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. 1953); *United States* v. *Close,* 215 F. 2d 439 (7th Cir. 1954) (cert. denied, 348 U. S. 970 (1955)); *United States* v. *Erikson,* 149 F. Supp. 576, at 578-580 (S.D. N.Y. 1957).

[11] "The persuasive weight of the recommendation of the Department of Justice is disclosed by the fact that out of 2,699 recommendations made between July 1, 1943 and June 30, 1944, the Boards of Appeal failed to concur with the Department in only 132 cases [or about 5% of the cases]. Report of the Attorney General of the United States for the Fiscal Year Ended June 30, 1944, 13."—Duggan, *The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service,* p. 115, Washington, The Catholic University of America Press, 1946.

If petitioner had been given the opportunity at the time he had his hearing in the Department of Justice or at least before the final recommendation of the Department adverse to him was made, he could have persuaded the Department of Justice to see that the local board had made a false memorandum and that petitioner did not lie about the time devoted to his ministry. The Department, moreover, may then have taken a contrary position and made a favorable recommendation to the appeal board. But it was entirely too late after the Department had taken its position against him. Sending petitioner a copy of the recommendation was an inadequate remedy.

It may be argued, since the trial court found against petitioner upon the issue of whether the board memorandum is correct and it was a fact issue, that was settled against petitioner, making the finding conclusive upon this Court. But such specious position ignores reality. The Government at the trial failed to call the clerk or any member of the local board to contradict the petitioner's testimony. This failure gives rise to the conclusive presumption that the witnesses, if called, would have corroborated petitioner's testimony.

The local board acted highly irregularly in making the memorandum, since it was not required by law to do so. It was also false and it was made behind petitioner's back.[12] The presence of this procedural irregularity places a burden upon the Government to show affirmatively to the contrary. (*Steele v. United States*, 240 F. 2d 142 (1st Cir. 1956)) The Government has failed to discharge this burden.

It is immaterial whether the memorandum stated the facts incorrectly or truthfully and whether the trial court found them to be true. It was incumbent upon the Department of Justice, in any event, to give petitioner a prior opportunity to answer or explain it. Only by affording advance notice can there be due process of law in the departmental proceedings. The departmental action here is condemned by *Simmons* v. *United States*, 348 U.S. 397, at 404-406 (1955), and *Gonzales* v. *United States*, 348 U.S. 407 (1955), which control here.

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[12] This irregularity appears in the comparison of the two documents in footnote 5 of this brief *supra*, page 7. This violated the "fair and just" provisions of the Act, *infra*, page 80.

It is submitted that this illegal action of the Department of Justice constitutes a denial of procedural due process of law, contrary to the "fair and just" provisions of the Act and the Fifth Amendment to the United States Constitution. This denial vitiated the proceedings and completely broke the link in the chain of the Selective Service proceedings, making void the final order. The error of the courts below on this point requires a reversal of the case with an order directing the entry of a judgment of acquittal.

TWO

Petitioner was denied procedural due process of law by the Department of Justice excluding from the draft board file the report of the Department of Justice hearing officer, pursuant to Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25), contrary to the provision of earlier Regulations that stood for over ten years and was in existence at the time of the enactment and re-enactment of the present law, which provided for the inclusion in the draft board file of the hearing officer's report rather than merely referring to it, as was done in this case in the recommendation of the Department of Justice to the appeal board, and which said exclusion of the report from the file also denied petitioner a full and fair hearing and due process of law before the appeal board, contrary to the "fair and just" provisions of the Act and the Fifth Amendment to the United States Constitution.

The testimony and the draft board file (Plaintiff's Exhibit 1) show that the hearing officer's report was not included but was merely referred to by the Department of Justice in its recommendation to the appeal board. [F. 36A-38; R. 27, 35-36, 174-177] Grounds 6 and 7 of the motion for judgment of acquittal complain of the above-stated invalidity of the pertinent part of Section 1626.25 of the Regulations, as amended[13] because it is in conflict with the intent of Congress as expressed in the enactment of the Selective Service Act of 1948 (62 Stat. 604, 609) and in the reenactment of the Universal Military Training and Service Act (65 Stat. 75, 83 (1951), 50 U. S. C. App. § 456 (1952)) and that the exclusion of it from the file and the failure to forward to the appeal board the typewritten report of the hearing constituted a denial of a full and fair hearing and due process of law, contrary to the "fair and just" provisions of the Act (Section 1(c), *infra*, page 80) and the Due Process Clause of the Fifth Amendment to the United States Constitution. [R. 113] These two grounds were relied on in the Court of Appeals in points 13 and 14. [R. 3-4] The points are raised in the petition for writ of certiorari.

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[13] The pertinent portions of Section 1626.25(d) prior to the 1952 amendment provided: "* * * The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."—E. O. 9988, 13 F. R. 4874, Aug. 21, 1948, as amended by E. O. 10292, 16 F. R. 9862, Sept. 28, 1951, 32 C. F. R. § 1626.25 (1951).

The pertinent part of Section 1626.25(e) (as amended by E. O. 10363, 17 F. R. 5449, 5451, and prior to amendment by E. O. 10659, 21 F. R. 1103, Feb. 17, 1956, p. 85, *infra*) provided: "The appeal board shall place in the Cover Sheet * * * of the registrant the letter containing the recommendation of the Department of Justice."

The conscientious objector provisions of Section 5(g) in the Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. §§ 301-318) were implemented by Section 627.25 of the Regulations.

The pertinent parts of the Regulation read in 1944 as follows: "(e) * * * The board of appeal shall place in the Cover Sheet (Form 53) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the hearing officer of the Department of Justice." (*Selective Service Regulations*, 1st ed., vol. 3, Classification and Selection (Washington: 1940), Section XXVII, par. 375, effective October 4, 1940; amended at 6 F. R. 2835; 6 F. R. 4253; it became Section 627.25 when the Selective Service Regulations, second edition, were issued Feb. 1, 1942; amended at 7 F. R. 4155; 7 F. R. 10520; 8 F. R. 14657; 8 F. R. 16720; 9 F. R. 7048.)—See also *Conscientious Objection*, Special Monograph No. 11, Vol. I, pp. 124-125, 147, Selective Service System, Washington, Government Printing Office, 1950.

The pertinent provision of the Regulations (32 C. F. R. § 1626.25) was promulgated under both the 1948 and 1951 Acts and existed until the amendment of June 17, 1952 (E. O. 10363, footnote 13, p. 31). It specifically provided for the letter of the Department of Justice and "the report of the Hearing Officer of the Department of Justice" to be placed in the cover sheet or the draft board file. (See footnote 13, page 31.) This section of the Regulations was not changed until the amendment of June 17, 1952 (E. O. 10363, page 31). Then the appeal board, for the first time, was required to place in the draft board file only a copy of the letter of the Department of Justice.[14]

Conscientious Objection, Special Monograph No. 11, Vol. I, p. 147, Selective Service System, Washington, Government Printing Office, 1950, concerning the procedure under the 1940 Act (54 Stat. 885, 50 U. S. C. App. §§ 301-318), together with the old Regulations (footnote 13, *supra,* p. 31), shows that the inclusion of the hearing officer's report in the draft board file was intended by Congress by the "fair and just" provisions of Section 1(c) of the Act, all of which were within the view of Congress when both the 1948 and the 1951 Acts were adopted.

The amended section of the Regulations, deleting the hearing officer's report, was in full force and effect on March 21, 1957, when the recommendation by the Department of Justice in this case was made to the appeal board. Petitioner submits, however, that Section 1626.25, as it existed before June 17, 1952 (footnote 13, *supra,* p. 31), and before it was changed to Section 1626.25(c) by E. O. 10363 (*supra,* p. 31), is still the law and that the changes made in the Regulation omitting the prior language approved by Congress in Section 1626.25(d) (see footnote 13, *supra,* p. 31) reading "both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice" are void, for the reasons stated in *Sterrett* v. *United States*, 216 F. 2d 659 (9th Cir. 1954), and *Billings* v. *Truesdell*, 321 U. S. 542 (1944).

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[14] Section 1626.25 was later amended to require also inclusion in the draft board file of "a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant."—E. O. 10659, 21 F. R. 1103, Feb. 17, 1956; E. O. 10714, 22 F. R. 4289, June 18, 1957.

It may be argued that the law does not require the inclusion of the copy of the stenographic report of the hearing to the Department of Justice. This was so held in *United States* v. *Stasevic*, 117 F. Supp. 371 (S.D. N.Y. 1953), which is, however, limited only to the issue there involved. The sole purpose of the subpoena *duces tecum* in that case was to prove that the single fact of the mere act of omission of the record made by the hearing officer from the draft board file made the proceedings void. The court, in *United States* v. *Stasevic*, 117 F. Supp. 371 (S.D. N.Y. 1953), found no need for "including the stenographic record in the administrative record."[15]

The decision in *United States* v. *Stasevic*, 117 F. Supp. 371 (S.D. N.Y. 1953), is contrary to *Sterrett* v. *United States*, 216 F. 2d 659 (9th Cir. 1954), which held that the 1948 re-enactment of the provisions of the 1940 Act while the 1940 Regulations were outstanding constituted congressional approval of such Regulations so that they had the effect of law and could not thereafter be changed without congressional approval.

The congressional re-enactment of the 1940 Act in the passage of the 1948 Act and the 1951 Act with the provisions of Section 1626.25(d) outstanding constituted a congressional re-enactment and approval of the procedure required, which included the filing in the draft board cover sheet of the registrant of the report of the hearing officer along with the recommendation of the Department of Justice. It is still the law that the hearing officer's report be included in the draft board file.

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[15] *United States* v. *Stasevic*, 117 F. Supp. 371 (S.D. N.Y. 1953), seems to have been overruled by the decision of the Court in *Gonzales* v. *United States*, 348 U. S. 407 (1955) at page 412, footnote 4, where the Court approved *Mazza* v. *Cavicchia*, 15 N. J. 498, 105 A. 2d 545 (1954), in which administrative proceedings were invalidated because a hearing officer's report was omitted from the record and withheld from the interested person involved in the proceedings.

In *Montgomery Ward & Co.* v. *N. L. R. B.*, 103 F. 2d 147 (8th Cir. 1939), it was held that the company was denied a fair hearing by omissions in the record. The rejection by immigration officials of pertinent evidence relating to a common law marriage was also held to be a denial of a full hearing. The court held that the person before the administrative agency was denied the privilege of introducing relevant evidence.—*Ex parte Verpault*, 86 F. 2d 113 (2d Cir. 1936).

In *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 226 (1938), the Court said: "We agree with the Circuit Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary."

In *Londoner* v. *City and County of Denver*, 210 U. S. 373, 386 (1908), the Court held that a fair hearing demanded the right to make proof. The Court said: "It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the State. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20. The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it." The authorities holding that the exclusion of evidence vitiates the order of an administrative agency are reviewed in *Donnelly Garment Co.* v. *N. L. R. B.*, 123 F. 2d 215 (8th Cir. 1941).

It is illegal to agree with the Government that the evidence withheld from the appeal board was not material or relevant to the conscientious objector claim. To hold that evidence that has been withheld is harmless error it must be made to appear that the evidence "could not materially have affected the outcome of the case."—Cooper, *Administrative Agencies and the Courts*, p. 185, University of Michigan, 1951.

In that book the author also states: "But normally it is impossible for a reviewing court to be assured that the outcome could not have been affected by the consideration of the excluded testimony, and in the usual case the necessary result of the exclusion of proper testimony is to void the administrative order."—*Ibid.*, p. 185.

It is submitted, therefore, that the holdings of the courts below are erroneous. The exclusion of the documentary evidence from the record by the Department of Justice, and the Department's withholding it from the appeal board constituted a deprivation of procedural due process of law. It was for the appeal board, not the Department of Justice, to say whether or not the evidence was relevant or material. The Department of Justice performed only an advisory function.—Compare *United States* v. *Nugent*, 346 U. S. 1 (1953); *Imboden* v. *United States*, 194 F. 2d 508 (6th Cir. 1952) (cert. denied, 343 U. S. 957 (1952)).

It is respectfully submitted that this Court should conclude that the pertinent part of Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25) is void because it conflicts with the congressional intent to re-enact the ten-year-old policy of including the hearing officer's report in the file. Even if this be found not to be so, then it is still submitted that, in the facts and circumstances of this case, the exclusion of the hearing officer's report from the file that went to the appeal board constituted a denial of procedural due process of law contrary to the "fair and just" provisions of the Act and the Fifth Amendment to the United States Constitution.

THREE

Petitioner was denied his right to a full and fair hearing in the District Court contrary to the Fifth Amendment when the trial court quashed the subpoena *duces tecum* calling for the production of the formal typewritten and legally-required report of the hearing officer concerning the hearing conducted by him and attended by petitioner and his witnesses, which was material and relevant and needed by petitioner at the trial to prove that the hearing officer denied petitioner procedural due process and did not conduct a full and fair hearing required by law.

At the trial petitioner developed the materiality of the typewritten report of the hearing officer, Evensen, to the Department of Justice. It has been extensively shown in the statement of the case. The Court is referred to such statement, *supra*, pages 8 to 11. The trial court sustained the objections of the Government and ordered the subpoena quashed. See the statement of the case, *supra*, page 11. This point was presented to the Court of Appeals under point 6 of the statement of points. [R. 2] It was presented to this Court in the petition for writ of certiorari.

The record showed that petitioner needed the typewritten report of the hearing officer at the trial in the District Court. This is so because the trial court had to determine whether the Department of Justice denied petitioner procedural due process of law.[16]

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[16] The typewritten report of the hearing officer was needed to establish the denial of procedural due process of law in the Department of Justice—

(1) By not letting petitioner know at the conscientious objector hearing that the Department of Justice intended to rely upon the false memorandum of the local board concerning his alleged exaggeration of time devoted to the ministry;

(2) By withholding favorable evidence developed at the hearing in behalf of the petitioner by petitioner and his witnesses which, if it had been given to the appeal board, would have supported petitioner's claim for classification as a conscientious objector; and

(3) By the hearing officer's denying petitioner a full and fair hearing at the conscientious objector hearing.

It has been held that the production of the informal longhand notes made by the hearing officer at the hearing may not be subpoenaed at the trial. (*Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir. 1958); cert. denied, No. 804, October Term, 1957, 356 U. S. 927 (1958); rehearing denied, 356 U. S. 964 (1958))[17] *United States* v. *Staseric*, 117 F. Supp. 371 (S.D. N.Y. 1953), held that the defendant was not entitled to the formal report of the hearing officer in that case.[18] Both *Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir. 1958); cert. denied, No. 804, October Term, 1957, 356 U. S. 927 (1958); rehearing denied, 356 U. S. 964 (1958) and *United States* v. *Staseric*, 117 F. Supp. 371, are not in point and are distinguishable for the reasons stated above.

The oral hearing on the conscientious objector claim in the Department of Justice is a vital link in the chain of proceedings. (*Sicurella* v. *United States*, 348 U. S. 385 (1955); *Simmons* v. *United States*, 348 U. S. 397 (1955); *United States* v. *Romano*, 103 F. Supp. 597 (S.D. N.Y. 1952)) If there has been a denial of procedural due process at the hearing or subsequently by the Department of Justice in the handling of the report in the recommendation to the appeal board this would be a break in the link that would vitiate the entire chain of proceedings. (*United States* v. *Romano*, 103 F. Supp. 597 (S.D. N.Y. 1952)). The subpoena *duces tecum* commanded the production of the formal report of the hearing officer for the precise purpose of showing these breaks in the link.

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[17] While the request for the formal typewritten report of the hearing officer was involved in *Bouziden* v. *United States*, *supra*, that opinion did not deal with it but limited the discussion to whether Bouziden was entitled to the informal longhand notes of the hearing officer.

[18] The demand in *Staseric* was made for the sole purpose of proving merely that the report of the hearing officer had been made to the Department of Justice and that it was not included in the draft board file. That case did not involve the same question that is here presented. Here petitioner seeks the report of the hearing officer for an entirely different purpose. It is to show that the Department of Justice in the respects above enumerated at the hearing denied petitioner procedural due process of law.

The recommendation of the Department of Justice is a secondary document prepared by the review officer of the Department of Justice in Washington. That recommendation is based upon the primary record of the draft board and the Department of Justice. The documents making up this primary record are (1) the hearing officer's report, (2) the draft board file and (3) the original FBI reports, summarized in the résumé sent to the registrant and the appeal board. The hearing officer's report and the other primary documents were used by the Department of Justice review officer in Washington in making his recommendation to the appeal board.

In this case the five-page report of the hearing officer was not summarized in the recommendation but merely briefly referred to in three paragraphs of it. The short reference to the hearing in the recommendation does not purport to be a summary of what occurred upon the oral hearing in the Department of Justice.

There are cases where the trial judge permitted the defendant at the trial of draft prosecutions to obtain the report of the hearing officer.[19]

It may be argued that the testimony of the petitioner is adequate and sufficient to prove whether there was a denial of procedural due process. Petitioner is not confined to his own testimony. The facts were more extensively stated by the hearing officer in his formal report made soon after the hearing. There are, moreover, two points on which the petitioner is unable to give any testimony. These are shown exclusively in the report. One is the withholding by the hearing officer or by the review officer of the favorable evidence presented at the hearing. Petitioner was entitled also to use the report of the hearing officer to impeach the officer on his equivocal testimony. He said he did not know whether he interrogated petitioner concerning the alleged exaggeration of time devoted to the ministry. The hearing officer first testified that he could not remember. [R. 55-56] Later he testified that he did not go into the exaggeration. [R. 60-62] Since the hearing officer was an adverse witness and equivocated in his testimony the formal report was needed to get the truth from the official record of the hearing.—*United States* v. *Andolschek*, 142 F. 2d 503 (2d Cir. 1944); *United States* v. *Krulewitch*, 145 F. 2d 76, 77-79 (2d Cir. 1944); *Jencks* v. *United States*, 353 U. S. 657, 671 (1957).

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[19] It is the rule of the United States District Courts for the Southern District of New York and the Eastern District of New York to permit defendants in draft prosecutions to obtain the report of the hearing officer for the purpose of proving a denial of procedural due process of law.

Judge Irving R. Kaufman allowed it in *United States v. Erikson*, 148 F. Supp. 576 (S.D. N.Y. 1957). Judge David N. Edelstein allowed it on January 20, 1959, in four cases in the Southern District of New York: No. C 155-223, *United States v. Parmiter;* No. C 155-221, *United States v. Heise;* No. C 155-219, *United States v. Corliss;* No. C 155-222, *United States v. Herold*. A copy of this order is printed as Appendix B, *infra*, pages 87 to 88. It was allowed in *United States v. Wider*, 117 F. Supp. 484 (E.D. N.Y. 1954, Rayfiel, J.).

The Government may say that the so-called "Jencks statute" (Pub. L. No. 85-269, 71 Stat. 595 (Sept. 2, 1957), 18 U. S. C. § 3500 (1958)), precludes the use of the documentary evidence here sought by petitioner. The "Jencks statute" is limited to the use of confidential Government reports for the purpose of impeaching a flesh-and-blood Government witness called by the Government who testifies against a defendant in a criminal case. It has nothing to do with comparison of documentary evidence involved in administrative proceedings—here the comparison of the recommendation with the report and the report with the testimony at the trial given by the hearing officer.—*Palermo* v. *United States*, 360 U. S. 343, 360-366 (1959); 35 New York U. L. Rev. 57-59 (1960).

It may be argued that there is no showing of materiality or that there is harm or prejudice to the petitioner from quashing the subpoena *duces tecum*. What is involved here is not the exclusion of a document from the evidence that is marked for identification. What happened here was the quashing of the subpoena. It is impossible to merely guess that the report of the hearing officer is not material or tha the petitioner is not harmed. This cannot be said to b material or immaterial until the report has been read. I has not even been seen yet! The order quashing the subpoena makes it impossible for this Court to speculate tha the hearing officer's report is immaterial or that the petitioner is not harmed.—See *Gordon* v. *United States*, 34 U. S. 414, 418-420 (1953).

It is submitted that the trial court committed reversibl error in quashing the subpoena *duces tecum* commandin the production of the typewritten report of the conscientious objector hearing prepared by the hearing officer an forwarded to the Department of Justice. This reversibl error requires a remand of the case to the trial court for new trial.

FOUR

Petitioner was denied a full and fair hearing in the District Court, contrary to the Fifth Amendment, when the tria court quashed the subpoenas *duces tecum* calling for th production of the FBI investigative reports used by th Department of Justice in conducting the hearing, making report thereon and in making the recommendation to th appeal board, which documents were needed by petitioner t prove his defense that the Department of Justice had withheld favorable evidence from the appeal board and summarized the unfavorable evidence out of context and wit a warped meaning, misleading the appeal board.

The issuance of the subpoenas commanding the production of the FBI report, the motion to quash, the argument of counsel and the rulings of the court have been heretofor stated in detail under statement of the case at pages 11-1 *supra,* this brief.

This question of national importance has been presente to this Court in a large number of cases but this Court ha consistently and repeatedly avoided a decision of the question. It was presented for the first time in *United States* v

Nugent, 346 U. S. 1 (1953). The Court refused to pass upon the question. See Joint Brief for Respondents, October Term, 1952, in No. 540, *United States* v. *Nugent* and No. 573, *United States* v. *Packer*, at page 181, and Joint Petition for Rehearing at pages 44-46. It was next presented in *United States* v. *Dal Santo*, 205 F. 2d 429 (7th Cir. 1953), cert. denied 346 U. S. 858 (1953). It was again presented to this Court in *Simmons* v. *United States*, 348 U. S. 397 (1955), but the Court again avoided a decision.[20] Two weeks after the *Simmons* decision, certiorari was denied (348 U. S. 970) in *White* v. *United States*, 215 F. 2d 782 (9th Cir. 1954), and in *Tomlinson* v. *United States*, 215 F. 2d 12 (9th Cir. 1954). Those petitioners sought review of whether the FBI reports were available to prove that the adverse evidence had been illegally used against the petitioners or had been presented out of context. This was the identical question avoided in the *Simmons* case as quoted from in footnote 20, *infra*. The Court has since denied certiorari in many other cases where petitioners sought the FBI reports to prove omission of favorable evidence in the summarization of the FBI reports by the Department of Justice.[21]

This petitioner is the tenth one of Jehovah's Witnesses who has climbed the treacherous, slippery, snow-bound certiorari slopes of this Court carrying this problem. He is the fourth conscientious objector to reach this Court, the pinnacle of the federal judiciary, with the weighty issue by getting certiorari granted. It is hoped that this problem will not be blown into the stratosphere and disappear in thin air without a resolution, as has happened in other cases.

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[20] "It being evident from the record before the Court that the Department of Justice has failed to provide petitioner with a fair résumé of the FBI report, it is unnecessary for us to pass on petitioner's further contention that the trial court erred in quashing his subpoena *duces tecum*."—348 U. S. at page 406.

[21] *Bouziden* v. *United States*, 251 F. 728 (10th Cir. 1958); cert. denied, 356 U. S. 927; *Leifer* v. *United States*, 260 F. 2d 648 (6th Cir. 1958); cert. denied, 358 U. S. 946; *Carnes* v. *United States*, 260 F. 2d 341 (6th Cir. 1958); cert. denied, 358 U. S. 946; *McFarland* v. *United States*, 260 F. 2d 566 (6th Cir. 1958); cert. denied, 358 U. S. 946; *Rogers* v. *United States*, 263 F. 2d 283 (9th Cir. 1959); cert. denied, 359 U. S. 967.

In this twelfth case it is expected that the Court will finally pass upon this question. It is necessary, regardless of a favorable decision on the first three points, because of the need to clarify the law so that the lower courts will be given a proper guide in the hundreds—if not thousands—of future trials of conscientious objectors.

The question is now pending before the United States Court of Appeals for the Second Circuit in *United States* v. *Corliss*, No. 25,706; *United States* v. *Heise*, No. 25,707; and *United States* v. *Herold*, No. 25,708; and in the United States Court of Appeals for the Ninth Circuit in *Kretchet* v. *United States*, No. 16,260. Those cases have been argued, but the decisions are being withheld pending a determination of this question by this Court in this case.

A large number of district courts have held that defendants in draft prosecutions are entitled to have produced at the trial the FBI reports for the purpose of determining whether there has been a denial of due process by the Department of Justice in the improper summarizing of the FBI reports.[22]

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[22] See *United States* v. *Geyer*, 108 F. Supp. 70 (D. Conn. 1952), quoted from by Mr. Justice Frankfurter, dissenting in *United States* v. *Nugent*, 346 U. S. 1, 10-12, and cited in footnote 11, 346 U. S., at 7; *United States* v. *Oller*, 107 F. Supp. 54 (D. Conn. 1952); *United States* v. *Edmiston*, 118 F. Supp. 238, 240 (D. Neb. 1954); *United States* v. *Evans*, 115 F. Supp. 340, 343 (D. Conn. 1953); *United States* v. *Stasevic*, 117 F. Supp. 371 (S.D. N.Y. 1953); *United States* v. *Stull*, No. 5634, Eastern District of Virginia, Richmond Div., Nov. 6, 1953; *United States* v. *Parker*, No. 3651, District of Montana, Butte Div., Dec. 2, 1953; *United States* v. *Brussell*, No. 3650, District of Montana, Butte Div., Nov. 30, 1953; *United States* v. *Fisher*, No. 6283, District of New Hampshire, March 16, 1954. (Nine slip copies of the unreported decisions accompany this brief.) But contra to the above are *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957); *Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir. 1958); *Rogers* v. *United States*, 263 F. 2d 283 (9th Cir. 1959); *Leifer* v. *United States*, 260 F. 2d 648 (6th Cir. 1958); *Carnes* v. *United States*, 260 F. 2d 341 (6th Cir. 1958); *McFarland* v. *United States*, 260 F. 2d 566 (6th Cir. 1958); *Campbell* v. *United States*, 221 F. 2d 454 (4th Cir. 1955); *White* v. *United States*, 215 F. 2d 782 (9th Cir. 1954); *United States* v. *Simmons*, 213 F. 2d 901 (7th Cir. 1954). This decision by the Seventh Circuit was extensively analyzed and criti-

In *United States* v. *Bouziden*, 108 F. Supp. 395 (W.D Okla. 1952), Judge Wallace compelled the United States Attorney to produce the FBI report and it was produced and made a part of the record in that case. After a decision favorable to the defendant the FBI report was returned to the Department of Justice. (108 F. Supp. 395, 399 (1952)) In two more recent decisions the district courts refused to follow *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957). They are *United States* v. *Eliasson*, 170 F. Supp. 686 (S.D. N.Y. 1959), and *United States* v. *Jacobson*, 154 F. Supp. 103 (W.D. Wash. 1957), which compelled the production to determine whether favorable evidence was withheld.

The petitioner believes that *United States* v. *Nugent*, 346 U.S. 1 (1953), was erroneously decided. See Joint Petition for Rehearing in No. 540, October Term, 1952, *United States* v. *Nugent*, and No. 573, *United States* v. *Packer*, at pages 41 to 47. This will be more extensively discussed under point Five, *infra*, pp. 62-78. The Court in *United States* v. *Nugent*, 346 U. S. 1 (1953), and *Simmons* v. *United States*, 348 U. S. 397 (1955), has misinterpreted the Act so as to say that all Congress intended was that there should be supplied to the registrant only a résumé of the unfavorable evidence gathered by the FBI after the inquiry called for in Section 6(j) of the Act. This too has since been the position of the Department of Justice in making the résumés suggested in *Nugent*. The position in both cases by this Court is erroneous.

Congress intended and due process of law compels that a registrant be supplied (1) a summary of all of the adverse evidence and (2) also one of all of the favorable evidence gathered by the inquiry. This means a fair summary or résumé of the entire full investigative report and not just part of it must be made. This is true since the main purpose

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cized by petitioner in Brief for Petitioner filed in No 251, October Term, 1954, *Simmons* v. *United States*, and the Court is here referred to pages 53 to 72 thereof, which was not considered by the Court because, as the Court said, the question was not reached.—348 U. S. at page 406.

of the Department of Justice investigation was to provide favorable evidence for the conscientious objector.—See *White* v. *United States*, 215 F. 2d 782 (9th Cir. 1954); *Sterrett* v. *United States*, 216 F. 2d 659 (9th Cir. 1954).

Now that Congress, therefore, intended to have not only the unfavorable but also the favorable evidence summarized it then follows as a natural corollary that when the registrant is prosecuted for failure to obey an order based on a classification denying the conscientious objector claim he can urge as defense to the indictment that the favorable evidence has been unfairly summarized so as to omit vital evidence, thus resulting in its being withheld from the appeal board. The registrant also is entitled to contend that the résumé of the adverse evidence that has been supplied to him has been prepared in a slanted or biased manner or else taken out of context.

The law allows the registrant the right to make these two contentions in defense to an indictment. It follows, therefore, that the subpoena *duces tecum* commanding the production of the FBI reports should not be quashed.

The problem presented cannot be understood without a consideration of the function of the FBI report and the résumé thereof in the Department of Justice and their effect on the appeal board.

In the Department of Justice hearing and proceedings both the original FBI report and the résumé thereof are witnesses for and against the registrant. The original testimony of informers in the FBI report—as approved in *United States* v. *Nugent*, 346 U. S. 1 (1953)—is never made available to the registrant. The registrant has access only to the résumé or summary which—contrary to due process—deals largely, if not entirely, with only the adverse evidence and always sparingly, if at all, with the favorable evidence. The general practice in the making of the summary of the favorable evidence in the FBI report is to merely refer briefly to the evidence that a person or some persons, without naming them, were favorable to the registrant. This is the way the favorable evidence gathered by the FBI inquiry was referred to in this case.

The conscientious objector also needs to know at his trial whether the adverse evidence has been taken out of context or summarized in a manner so as to slant it against him or given a false meaning. He is entitled to know the identity of the persons giving the hearsay evidence and gossip against him so it can be determined whether it is presented in a manner that is biased or prejudiced. He also is entitled to know whether the person preparing the résumé or summary is biased or prejudiced against him or conscientious objectors as such.

The conscientious objector is entitled to know whether favorable evidence has been withheld. His whole claim may hinge on whether there is a preponderance of witnesses and credible testimony in the reports either for or against him. It may very well be that the larger number of persons interviewed are in favor of the sincerity of the registrant's claim when his case gets before the appeal board but because of the inadequacy of the résumé to summarize any of the favorable evidence the résumé does not show this so that the conscientious objector is put at a distinct disadvantage before the appeal board in violation of procedural due process.

The conscientious objector is entitled to know at the trial if there has been presented to him and the appeal board a résumé or summary of only the adverse evidence and that the Department made no summary of the favorable evidence. He is entitled to show that he has been treated like a defendant in a criminal case whose witnesses have been abducted, or scared away from the courthouse, or refused to testify because of fear and who is confronted with an array of prosecution witnesses with him left alone to rebut the galaxy of prosecution witnesses who paraded before the jury.

The outcome of his conscientious objector claim hinges almost entirely upon the impression that is made to the appeal board through the résumé made by the Department of Justice. The manner of summarizing the FBI report is invariably—as in this case—presented to the appeal board in an adverse, one-sided fashion.

The outcome of the claim depends largely on the number of witnesses shown to be either for or against the sincerity of the registrant, as in judicial proceedings. It is important that the registrant and the appeal board, therefore, have a full and fair summary of all the statements given to the FBI, showing the number of witnesses with a summary of all that each said, either adverse or favorable. This was not done here.[23]

The legislative history and the terms of the Act itself show that all of the favorable evidence, as well as the adverse evidence, should be made known to both the appeal board and the registrant by the Department of Justice in advance of the hearing.

The Selective Training and Service Act of 1940 (54 Stat. 885, *et seq.*) followed conferences and reports by the House and Senate on Senate Bill 4164, 76th Cong., 3rd Sess., introduced June 20, 1940, and House Bill (H. R. 10132). Senate Report No. 2002, p. 9, August 5, 1940, on Senate Bill 4164 stated among other things: "The measure is fair both to a person holding conscientious scruples against war and to the Nation of which he is a part. It provides for inquiry and hearing by the Department of Justice to make recommendations as to whether a person claiming deferment because of conscientious objection to war is or is not a bona fide conscientious objector. * * * *The rights* of the conscientious objector and of the Government *are fully protected* against possible local prejudice, influence, or passion, *by provision for appeal to a board of appeal.*" (Italics added.)

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[23] The late Judge Frank in *United States* v. *Nugent* (200 F. 2d 46 (2d Cir. 1952); reversed, 346 U. S. 1) said: "Even if the FBI report were favorable to the defendant, it may well be that the statute required that it be disclosed to him at or before the hearing held by the hearing officer. Cf. *Griffin* v. *United States*, 183 F. 2(d) 990, 993 (App. D. C.), where the court said that 'the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful [favorable] to the defense.' True, the hearing here was not a criminal trial. But its effects on defendant might be fully as important." [Bracketed word added.]

The "Statement of the managers on the part of the House" in conference report dated September 12, 1940, eliminated the provision of the original bill providing for a Department of Justice investigation and report to the local board in advance of classification. This was transferred to the appeal board instead.—Compare 86 Cong. Rec. 11689 with 86 Cong. Rec. 12038 and 12082, 12083-12084, 76th Cong., 3rd Sess.

The bill finally approved provided for an inquiry and hearing upon "the character and good faith of the objections" and also for the recommendation to the appeal board. —House Report 2947, 76th Cong., 3rd Sess., September 14, 1940, pages 17-18; 86 Cong. Rec. 12083-12084.[24]

The very fact that "new factors" (emphasized in footnote 24, *supra*) might be "brought to light" by the investigation and hearing meant that Congress intended that all the "light"—favorable and unfavorable evidence—be made available for the use of the registrant and the appeal board. Certainly Congress did not intend that favorable "new factors" would be within the knowledge of only the Department of Justice and be withheld from the registrant and the appeal board. They were also entitled to have all the "light" that was kept back by the Department.

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[24] In *Conscientious Objection*, Special Monograph No. 11, Vol. I, pages 126, 150, 155, Selective Service System, Washington, Government Printing Office, 1950, General Hershey stated:

"* * * The investigation in this type of case is an inquiry into the character of the registrant, and is undertaken to determine whether he has the religious training and belief required by the statute, whether he is sincere, and whether his daily conduct is consistent with his professed claim for exemption as a conscientious objector. * * *" (Page 126)

"* * * In addition such reference was necessary because new factors in the case might be brought to light by the Department's investigation and hearing. . . ." (Page 150)

"* * * The Department even went further by having the Federal Bureau of Investigation make a special investigation of the registrant and a Hearing Officer conduct hearings for him to provide exhaustive material on conduct, training, and belief. These data were basic also when the State Director or the Director of Selective Service was considering an appeal to the President and when the Presidential Appeal Board was engaged in classifying." (Page 155)

See also Duggan (formerly Assistant to the Attorney General in charge of processing conscientious objectors under the 1940 Act), *The Legislative and Statutory Development of the Federal Concept of Conscription for Military Service*, pp. 113-115, Washington, The Catholic University of America Press, 1946; Sibley and Jacob, *Conscription of Conscience*, pp. 72-74, Ithaca, N.Y., Cornell University Press, 1952; Cornell, *The Conscientious Objector and the Law*, pp. 25-29, New York, The John Day Company, 1943.

Withholding of parts of the FBI report from the registrant and the appeal board by an incomplete or one-sided summary keeps all the "light"—favorable or unfavorable evidence—away from the very ones who need it. The registrant is vitally concerned over his classification. The ultimate and final responsibility for classification is placed on the appeal board so that agency also vitally needs all the "light" or "new factors" favorable to the registrant, as well as the unfavorable factors.

It is contrary to the intent of Congress that the Department of Justice withhold any of the "light," favorable or unfavorable, from the appeal board. Surely Congress did not intend that the registrant and the appeal board be kept in darkness while the Department of Justice basked in all the "light."

The Director of Selective Service, as shown in footnote 24, *supra*, also states that the purpose of the investigation and hearing is to provide "exhaustive material." If this material is to be "exhaustive" for the use of the appeal board, it must be a summary of the complete FBI report, favorable as well as unfavorable evidence, and also be made available to the appeal board. It is not if it is kept in the secret files of the Department of Justice.

It seems, therefore, that the fair and reasonable interpretation of the 1940 Act, the Regulations and the legislative history clearly indicate that a full and fair summary of the complete FBI report of all the favorable, as well as adverse, evidence was intended to be made available to the registrant and included in the draft board file when it was returned to the appeal board.

After the expiration of the 1940 Act, the President, on March 17, 1948, requested Congress to enact a new law. (Senate Report No. 1268, May 12, 1948, to accompany Senate Bill 2655, pages 1-2) There were extensive debates in both the House and the Senate over the conscientious objector problem, but no material changes were made from the 1940 Act.—House Report No. 2438, June 19, 1948, page 48; 94 Cong. Rec., 7277-7279, 7303-7304, 7305-7306, 7307.[25]

When Senate Bill 2655 was finally considered, there was no specific discussion whatever as to the manner of the investigative procedure pursued by the FBI and the policy to withhold the original of the secret investigative report from the registrant and the appeal board by the hearing officer and the Department of Justice, which even gave no résumé thereof, as had been the practice under the 1940 Act. —94 Cong. Rec. 7305-7307, 7681, 8829-8830, 9255-9256, 9277, 9354, 9363.

The general rules of due process were not ignored or eliminated by Congress in the passing of the 1948 Act. A full and fair hearing required by the Fifth Amendment was in the minds of Congress when it provided in Section 13(b) of the Selective Service Act of 1948 (62 Stat. 623,

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[25] There was a proposed amendment to take classification of the conscientious objector from the Selective Service System and the Department of Justice and place it with a special commission. But Congress rejected it and followed Senator Gurney, who said: "Heretofore, the Department of Justice has investigated appeals which the objectors make from the local boards. * * * *What we are after really are the facts, and the Department of Justice has always shown itself perfectly capable of uncovering the facts.* * * * The local selective service board, which classifies these men, would have no way in which to ascertain whether or not they were simply attempting to evade service, rather than having a bona fide conscientious objection. Therefore, *striking that part* of the section having to do with investigation by the Department of Justice *would preclude the thorough investigation needed in these cases.*" (Emphasis added.) The amendment proposed by Senator Morse was rejected.—94 Cong. Rec. 7306, 7307.

50 U. S. C. App. § 463(b)) for all information to be made available.[26]

The two strong provisions shown in footnote 26 clearly show that Congress did not intend to narrow the constitutional requirement of procedural due process, and good cause must be shown for withholding any evidence. Congress, by keeping in this part of the Administrative Procedure Act, recognized the requirements of the Fifth Amendment making it necessary to have all the facts—favorable and unfavorable evidence—gathered by the FBI made available to the registrant and the appeal board as a public record when it enacted the provisions of the 1948 Act.

It seems that Section 13(b) of the Selective Service Act of 1948 and of the Universal Military Training and Service Act, which re-enacted the 1948 Act (see 65 Stat. 87 (1951), 50 U. S. C. App. § 463), adopting a part of the Administrative Procedure Act, provides for disclosure of both the favorable and the unfavorable evidence. The very fact that Congress provided in the Act for an appropriate *investigation* and *hearing* constitutes a specific overruling of the Department of Justice one-sided policy, regardless of whether or not this policy was discussed by Congress.

The Congress that passed the 1940 Act, as well as the 1948 and 1951 Acts, specifically stated that selection of registrants must be made by "fair and just" standards. Senate Report No. 1268, 80th Congress, Second Session, May 12, 1948, accompanying Senate Bill 2655, stated (p. 5): "This subsection enunciates the principle that the obligations and privileges of serving in the armed forces should be shared generally, and in accordance with a just system of selection." The Act itself so provides. (See Section 1(c), *infra*, p. 80.) This provision is almost identical to the provision appearing in the Selective Training and Service Act of 1940.[27]

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[26] "All functions performed under this title shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 of such Act."

Section 3 of the Administrative Procedure Act (60 Stat. 238 (1946), 5 U. S. C. § 1002) reads:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating to the internal management of an agency— * * * (c) Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned *except information held confidential for good cause found.*" (Emphasis added.)

A "fair and just" selection of registrants cannot be accomplished without a full and fair hearing. The Act and Regulations contemplated that the hearing before the hearing officer of the Department of Justice would not be full and fair unless the registrant was provided with both the favorable and unfavorable evidence. Had the local board used outside evidence and refused to disclose all of it to the registrant this would have been a violation of the Regulations.—32 C. F. R. §§ 1623.1, 1626.24.

The Regulations require that all evidence used be put in the file. Since the local board must accord the registrant notice of adverse evidence so that he can refute it or make it available to him by reducing it to writing and putting it in the file, it seems only just and proper that the investigative report used by the hearing officer and the Department of Justice also be fully summarized and show all of both the favorable and the unfavorable evidence. Without doing this there is not a "fair and just" selection contemplated by the Act. The President, in promulgating the Regulations (32 C. F. R. §§ 1623.1 and 1626.24) placed this executive interpretation on the Act.

The Government will argue that since Congress was not constitutionally required to provide for any particular kind of appeal procedure the practice of the Department of Justice in withholding favorable evidence should be approved by this Court. Congress in Section 6(j) of the Act did provide for an appeal procedure. The section uses the word "hearing." This word was not limited in its definition. The "hearing" was to determine the right granted by the Act. The right was the conscientious objector status. The very fact that a "hearing" was provided to protect the right means a "hearing" based on both the favorable and the unfavorable evidence was intended. This cannot be sidestepped by the specious argument that the Constitution did not require Congress to provide for it. Congress did provide. That is enough.

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[27] "The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service."—Section 1(b), 54 Stat. 885.

Congress, in passing the various draft acts since 1940, had in mind the historic national policy of fair treatment to conscientious objectors. The Selective Service System also has recognized this policy.—See *Conscientious Objection,* Special Monograph No. 11, Vol. I, pages 29-41, 42-43, Selective Service System, Washington Government Printing Office, 1950; *Girouard* v. *United States,* 328 U. S. 61, at pp. 68-69 (1946).

Congress did not intend to undermine the fair treatment intended by permitting fundamentally unfair one-sided summarizing of evidence in favor of the Government and against the conscientious objector. The legislative history of the 1948 and 1951 Acts fails to show any discussion or consideration of the departmental procedure in the use of the FBI report. *United States* v. *Nugent,* 346 U. S. 1 (1953), was not decided until after the enactment of the present law. *Nugent* has not, therefore, been approved by Congress.

The Government will undoubtedly contend that the reenactment of the provision of the 1940 Act by the 1948 Act and the 1951 Act, without objection, approved the practice of the Department of Justice theretofore existing. This is not borne out by the legislative history or the terms of the Act. Section 13(b) of the 1948 and 1951 Acts says that Section 3(c) of the Administrative Procedure Act providing for the disclosure of official records shall prevail. It cannot be said that there was acquiesence by the public or approval by Congress of the unconstitutional, one-sided summarization of the FBI reports by the Department of Justice or to give no summary of the favorable evidence, the old policy that existed before *United States* v. *Nugent*, 346 U. S. 1 (1953).

Prior to the decision in *United States* v. *Nugent*, 346 U. S. 1 (1953), no written summary or résumé of even the adverse evidence was given. The written résumé was not invented until this Court suggested it to the Department of Justice in *Nugent*. See the Joint Petition for Rehearing in Numbers 540 and 573, October Term, 1952, *United States* v. *Nugent* and *United States* v. *Packer*, at pages 9-12.

Silence of the general public, the witnesses that appeared before the congressional committees and of the members of the House and the Senate when the 1948 and 1951 Acts were considered does not constitute an approval of the illegal procedure of providing only the unfavorable evidence and omitting the favorable evidence. This is rejected by *Girouard* v. *United States*, 328 U. S. 61 at pages 69-70 (1946), and *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940).

The Government may argue that Congress by extension of the draft law in 1955 and 1959 has approved *United States* v. *Nugent*, 346 U. S. 1 (1953). If this argument be made, it is condemned by the decisions of this Court referred to by Mr. Justice Douglas in "Stare Decisis," 49 Columbia Law Review 735, at page 746. There he said, among other things, that "the Court rejected numerous pleas to let Congress correct mistakes that the Court had created. It was also reluctant to find in the silence of Congress approval of the statutory interpretations which it had adopted."

It was the intent of Congress that there be no withholding of any evidence either favorable or unfavorable. Certainly Congress in its intent to be "fair and just" had in mind that the Department of Justice show both sides of the picture—a man's sincerity or insincerity—as a conscientious objector. It is iniquitous and nefarious to have one-sided proceedings where any evidence is withheld. To presume that Congress intended this by mere silence is so violent that it cannot be accepted. It should be rejected. The contrary is true. The silence of Congress about the departmental procedure for one-sided résumés—in view of its declaration of "fair and just" or due process—proves its intent to condemn the procedure and to supply both the favorable and the unfavorable evidence.

There are various holdings that the subpoena *duces tecum* commanding production of the FBI report at the trial be quashed.[28] These are all based upon *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957). *Blalock* v. *United States, supra*, held that *United States* v. *Nugent*, 346 U. S. 1, 9 (1953), decided that Congress did not intend "a full-scale trial for each appealing registrant." (247 F. 2d at p. 620) To deny the production of the report the court, in effect, said that because of the "résumé of the adverse evidence" and the "full-scale trial" statements in *United States* v. *Nugent, supra,* the function of the Department of Justice is not to supply a summary of all of the favorable evidence in the FBI reports.

The court in *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957), said that in any event *United States* v. *Nugent, supra,* makes inapplicable *Jencks* v. *United States*, 353 U. S. 657 (1957); and *Gordon* v. *United States*, 344 U. S. 414 (1953). (247 F. 2d at 620, 621) Judge Sobeloff concluded that "it is not for us to extend the *Jencks* doctrine to penetrate the sphere in which the *Nugent* case unmistakably declared the applicable law."—247 F. 2d at 621.[29]

The United States Courts of Appeals for the Sixth, Ninth and Tenth Circuits have relied upon this reasoning of the Fourth Circuit in *Blalock* v. *United States*, 247 F. 2d 615 (4th Cir. 1957). Those courts, as well as the Fourth Circuit, have entirely overlooked the fact that, in the trial of all conscientious objector cases under the Act, there is an issue of procedural due process in Department of Justice proceedings. It is to determine whether the Department of Justice has broken the link in the procedural chain by denying procedural due process of law. This was so held in *Gonzales* v. *United States*, 348 U. S. 407 (1955); *Simmons* v. *United States*, 348 U. S. 397 (1955); and *Sicurella* v. *United States*, 348 U. S. 385 (1955).

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[28] *Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir. 1958) (cert. denied, 356 U. S. 927 (1958); rehearing denied, 356 U. S. 964 (1958)); *Rogers* v. *United States*, 263 F. 2d 283 (9th Cir. 1959) (cert. denied, 359 U. S. 967 (1959)); and *Leifer* v. *United States*, 260 F. 2d 648 (6th Cir. 1958) (cert. denied, 358 U. S. 946 (1959)).

[29] A petition for writ of certiorari was timely prepared and printed for filing in the *Blalock* case (247 F. 2d 615 (4th Cir. 1957)). It was mailed six days before the last day in which to file (September 6, 1957). The normal mailing time from New York to Washington rarely exceeds two days and is never more than three days. Due to the irregularity and delay in the mails the petition did not reach the office of the Clerk of this Court until Monday, September 9, 1957, two days after the last day to file it. The Clerk was instructed by counsel not to file the petition when he was informed that it had been received too late.

There is still another way by which the Department may deny procedural due process of law. It is by concealing or holding back from the consideration of the appeal board favorable evidence supporting petitioner's conscientious objector claims or by misrepresenting and over-exaggerating unfavorable evidence. This is through making an incomplete or inaccurate summary of the original FBI reports, suggested in *United States* v. *Nugent*, 346 U. S. 1 (1953).

Since this is an issue for the district court trying the conscientious objector cases to decide, the question inevitably arises: How can the trial court determine whether the Department of Justice withheld favorable or misrepresented unfavorable evidence by making an incomplete summary? The question answers itself: By a mere comparison of the documents with the summaries thereof.

Even Judge Sobeloff admitted this by a statement made in the opinion in *Blalock*. There he said: "Moreover, it is undeniably true that one cannot easily judge the fairness and completeness of a résumé without looking at the documents it purports to summarize."—247 F. 2d at 620.

The issue can be very well likened to that of a trial where a book review is the subject of decision. How can the court determine whether the book review is full and fair without reading the book? The judicial function could not be completed unless and until the book was produced. So it is here. The court cannot say whether a fair summary of the favorable evidence was given until the FBI report, which was summarized, is produced for comparison.

The above-quoted equivocation by the court in *Blalock* (247 F. 2d 615) calls to mind the words of Mr. Justice Jackson in *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 214 (1947): "Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" After all the very extensive discussion by the court in *Blalock* (247 F. 2d 615) it never gets around to answering the point: How can the court decide whether a full and fair summary of the favorable evidence in the FBI report was given to the registrant? It could not answer the question without confessing that it was necessary to see the FBI report. Consequently that court avoids facing the issue by talking about everything else and fleeing to *Nugent* (346 U. S. 1), which is not controlling.

The Fourth Circuit in *Blalock* (247 F. 2d 615), the Tenth Circuit in *Bouziden* (251 F. 2d 728), the Ninth Circuit in *Rogers* (263 F. 2d 283), and the Sixth Circuit in *Leifer* (260 F. 2d 648), grounded their decisions on *Nugent* (346 U. S. 1). That decision gives no support for the holding in those cases. *Nugent* involved the one question: Whether all the adverse evidence in the FBI report should be given to the registrant during the Department of Justice proceedings only by submitting the original report to him. The Court held that giving a mere summary of the adverse evidence excused the Department from producing the original.

The question of whether the defendants in that case had the right to subpoena the FBI report at the trial was not considered, although it was raised in the brief filed in this Court by Nugent and Packer. Since the question was not decided by this Court in *Nugent* (346 U. S. 1), then how can the Court of Appeals in *Blalock* (247 F. 2d 615) amend the the decision of this Court in *Nugent* by saying that this Court held that the FBI report was not available? The decision in *Blalock* is based upon a nonexistent holding by this Court in *Nugent* (346 U. S. 1).

It may also be said, but not admitted, that the registrant is not unduly harmed in the administrative proceedings by withholding unfavorable evidence at the Department of Justice hearing. The reason may be that the written summary of the unfavorable evidence is all that reaches the appeal board and the registrant has the right to answer that before the appeal board. (*Gonzales* v. *United States*, 348 U. S. 407 (1955)) He has no way, however, of overcoming the prejudice done by a slanting of such adverse evidence or the taking of it out of context in the résumé. The holding back and not making known to him and to the appeal board of the favorable evidence, as above shown, is also a denial of due process. Both of these denials of due process can be determined by the district court only by a comparison of the summary with the original report.

This ruling of the court below denying petitioner the right to show a violation of procedural due process through the Department of Justice withholding evidence from the appeal board by quashing the subpoenas is out of harmony with *Jencks* v. *United States*, 353 U. S. 657, 671 (1957). There a statement given to the FBI by a witness against the defendant was held to be relevant to test the accuracy of his testimony. Here the summary of the FBI report was a "witness" against petitioner in the appeal board. The record shows a similarity in principle with *Jencks, supra.*

In the trial court, as a basis for acquittal, petitioner contended that vital and important evidence favorable to his conscientious objector claim was omitted in the summary —a "witness" against petitioner's conscientious objections in the appeal board—thus denying procedural due process of law. This was not "fair and just." Section 1(c) of the Act provides for "a system of selection which is fair and just." Petitioner, to prove such denial of due process was entitled to test the "witness" (the résumé) against him on his conscientious objector claim. Due process of law in the District

Court gives him the right to compare the résumé with the report to see whether such "witness" omitted important and material evidence supporting his conscientious objector claim that should have been given to the appeal board which may have overcome the adverse recommendation made by the Department of Justice.

It may very well be that a comparison of the FBI reports with the summary made of them to the appeal board will show a vital omission. But assume it will not. In any event the petitioner was entitled by procedural due process of law in the District Court to see the original reports and compare them with the résumé. Yet he was denied this right in the District Court to call his "witness" (the FBI reports) to testify against the résumé, by the order quashing the subpoena *duces tecum*.

The compulsory production of the FBI reports at the trial would have enabled the District Court to perform its judicial function properly. A comparison of the original FBI reports with the adverse evidence appearing in the summary may also have shown that petitioner was prejudiced by biased slanting of the adverse evidence or taking it out of context.

The Government may argue that the comparison of the documents at the trial will not divulge the withholding of a great deal of favorable evidence. The answer to this appears in the draft board file. Reading the résumé of the supplemental inquiry [R. 178-180] shows merely a reference to the existence of favorable evidence and nothing else. It does not even purport to summarize the favorable evidence. See the first page of the résumé. [F. 38A; R. 178] This is quoted, *supra,* page 8. Two thirds of the résumé is taken up with the adverse evidence concerning an alleged arrest of petitioner. [F. 39-39A; R. 179-180] It is plain that there was a withholding of the favorable evidence because no summary of the favorable evidence was made. There is no way of telling whether the résumé gives a biased slant to the unfavorable evidence except by reading the original reports.

In determining whether the registrant has been denied a full and fair hearing before the appeal board by withholding favorable evidence the issue is not what the Department told the appeal board in its recommendation. The issue is: What did the Department of Justice fail or refuse to make known to the appeal board that was favorable to the registrant in the summary? The résumé of the FBI reports in this case appears in the draft board records. But there is absolutely nothing in the recommendation of the Department of Justice or in the summary itself to show that all of the favorable evidence in the FBI reports or all statements given by witnesses to the FBI were fully summarized or even summarized at all in the résumé.

The judicial function is completely paralyzed—stopped dead in its tracks—until the federal court has (1) compelled the production of the FBI reports, (2) examined them and (3) compared them with the résumé sent to the registrant and the appeal board and (4) then decided by such examination whether there has been a withholding of evidence favorable to the registrant in violation of procedural due process of law.

It may be argued that the issue of subpoenaing the FBI reports would be irrelevant in determining whether petitioner's classification by the appeal board has a basis in fact. The issue to be determined, to which the subpoena of the FBI reports is relevant, is not whether there was basis in fact. The issue is whether a fair résumé of the favorable evidence was not given to the registrant, denying procedural due process.

It should be remembered that the Department of Justice makes its recommendation upon the entire original FBI reports and does not confine itself to the résumé. There may be and often is a great deal of favorable evidence that is never mentioned in the résumé that would lead the appeal board to a favorable conclusion. To argue that notice of the evidence is confined only to what appears in the recommendation is to ignore reality and to greatly curtail and limit petitioner's right. He cannot be limited to a summary of only what is referred to by the Department of Justice. How can petitioner answer what unfavorable parts are relied on by the Department of Justice which are not referred to by it if he does not have access by a full summary to all of the favorable evidence?

It may be said that petitioner has at no time set forth reasons for belief that the FBI reports contained additional information favorable to his claim which was not disclosed to him. The subpoenas for the FBI reports were not issued in the vague hope that they contain favorable evidence, but so the trial court could discharge its judicial function to decide that question. This could only be determined by seeing the FBI reports which have been hidden until now.

Petitioner challenges any limitation of the right to be provided with favorable information. The Government limits the right to only such favorable evidence that is mentioned by the Department's recommendation. At the time of the hearing, how can petitioner know what the appeal board will thereafter rely upon? It is the duty of the Department to provide petitioner with a fair summary of all the favorable evidence in the FBI reports. A rule that would confine the subpoena to only that which was referred to in the recommendation to the appeal board puts the cart before the horse and places the entire matter solely in the unreachable discretion of the Department of Justice. Congress did not intend this, because, as has been shown heretofore, Congress said that it was after the facts. How can the facts be obtained if the Department of Justice shall say what part of the facts it shall divulge?

Actually, what Congress was after by reference of the case to the Department of Justice were facts and circumstances that were consistent with the religious beliefs of the organization to which the conscientious objector belonged. (*White* v. *United States*, 215 F. 2d 782, 789 (9th Cir.

1954)) The Government here has never attempted to turn up any fact showing that petitioner has done that which is inconsistent with his religious beliefs. The facts turned up are facts inconsistent with what the Government says is a true conscientious objector. This attempt of the Government to constitute itself a hierarchy of conscientious objectors under the law is contrary to the intent of Congress. It permits the Government to discriminate, contrary to equal justice under law.

White v. *United States*, 215 F. 2d 782 (9th Cir. 1954), held that the FBI report cannot be subpoenaed to judicially determine whether all the unfavorable evidence was given to a defendant in a criminal case of this kind. The *White* case (215 F. 2d 782) laid down the proposition that the congressional intent was that the entire procedure prescribed by Section 6(j) of the Act was for the purpose of turning up all the favorable evidence possible to sustain the claim of the registrant. The reason was that the Department of Justice procedure is invoked only on the appeal from a denial of the conscientious objector classification.—See 215 F. 2d at pages 789-790; compare *Sterrett* v. *United States*, 216 F. 2d 659 (9th Cir. 1954).

There are two excellent articles in the law reviews that deal with the confusion in the law involving the subpoenaing of the FBI reports on the trial of conscientious objector cases since *Jencks* v. *United States*, 353 U. S. 657 (1957), was decided, inasmuch as that decision failed to cite or mention *United States* v. *Nugent*, 346 U. S. 1 (1953).—See 12 U. Miami L. Rev. 221, 224-227 (1958); 34 Indiana L. Jour. 441, 445-450 (1959).[30]

It seems plain that due process of law in the United

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[30] Earlier law reviews have criticized the decisions that have quashed the subpoena *duces tecum* commanding the production of the FBI reports at the trial and commended the decisions in favor of the production thereof.—68 HARVARD L. REV. 380, 381-382 (1954); 50 NORTHWESTERN U. L. REV. 660, 671-676 (1955); see also 4 DEPAUL L. REV. 296, 303, 304-306 (1955); 101 U. PENNSYLVANIA L. REV. 692-697 (1953); 20 U. CHICAGO L. REV. 441, 446-447 (1953); 21 U. CHICAGO L. REV. 759, 761-764 (1954).

States District Courts in criminal trials commands that the FBI reports be produced in a draft prosecution, the same as any other criminal case. (*United States* v. *Andolschek*, 142 F. 2d 503 (2d Cir. 1944); *United States* v. *Beekman*, 155 F. 2d 580 (2d Cir. 1946); *United States* v. *Reynolds*, 345 U. S. 1 (1953); *Jencks* v. *United States*, 353 U. S. 657 (1957); *Palermo* v. *United States* 360 U. S. 343 (1959); 35 New York U. L. Rev. 57-59 (1960)) The purpose is in order that justice can be done. The defendant in a draft prosecution cannot be constitutionally denied the right to make his defenses that there are violations of procedural due process of law in the Department of Justice, the arm of the Selective Service System. The quashing of the subpoenas prevented petitioner from showing that favorable evidence was withheld and that adverse evidence may have been slanted or taken out of context by the one that prepared the résumé.

It is respectfully submitted that the trial court committed reversible error in quashing the subpoenas *duces tecum* commanding production of the FBI reports and that petitioner was denied procedural due process of law upon the trial in the District Court contrary to the Fifth Amendment to the United States Constitution.

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In the event the Court concludes that *United States* v. *Nugent*, 346 U. S. 1 (1953), keeps petitioner from obtaining the use of the original FBI reports at his trial under the indictment, then this Court is requested to overrule and set aside *United States* v. *Nugent*, 346 U. S. 1 (1953), because it was erroneously decided and it does not correctly interpret and apply the Act or the Fifth Amendment to the United States Constitution.

Petitioner believes, if the Court rules that he is entitled to have made available to him through the subpoenas *duces tecum* all the FBI reports made as a part of the inquiry under the Act so as to determine whether he was denied procedural due process of law through the résumé, it will be unnecessary to reconsider *United States* v. *Nugent*, 346 U. S. 1 (1953). The predicament into which *Nugent*, as interpreted by various Courts of Appeals, has driven the petitioner now forces him to unequivocally and unhesitatingly call upon the Court to overrule *Nugent* (346 U. S. 1) in this case.

The Court in *Nugent* (346 U. S. 1) erroneously interpreted the congressional intent by saying that the Act was satisfied when the Department of Justice supplied registrants with "a fair résumé of any *adverse evidence* in the investigator's report." (Emphasis added.) (346 U. S., p. 6) The holding in the *Nugent* case does not expressly exclude a résumé of the favorable evidence. Let some of the erroneous assumptions in *Nugent* now be stated: (1) there is a "litigious interruption" in the Selective Service process which justifies the denial of access by registrants in the Department of Justice proceedings to the original FBI reports (346 U. S., pp. 9-10); (2) the production of the FBI reports in the Department of Justice to the registrants would result in a "full-scale trial" (346 U. S., p. 9); and (3) the Act simulates the Department of Justice proceedings to the legislative and executive proceedings involved in *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294 (1933), so as to preclude a full disclosure (346 U. S., p. 8).

The underlying fault of the *Nugent* decision (346 U. S. 1) is the failure of the opinion to discuss any reason of security or national welfare for the withholding of the original FBI report at the conscientious objector hearing. It is stated nowhere in the opinion that any imperative national interest or security interest of the nation exists that justifies denying the conscientious objector the right to see the confidential FBI report. The decision has been criticized for this failure to give any valid reason by a number of respected law review writers.—62 Yale L. Jour. 1163, 1194-1196, (1953); 29 New York U. L. Rev. 511-513, (1954); 34 Indiana L. Jour. 441, 445-451 (1959); 12 U. Miami L. Rev. 221, 224-227 (1958).

The Court has without any constitutional or statutory justification denied conscientious objectors in the Department of Justice proceedings the same right that is granted to other persons in other administrative proceedings under the same or similar circumstances.[31]

The best criticism that can be leveled against the decision of the Court in *Nugent* (346 U. S. 1) is supplied in the dissenting opinions, 346 U. S. at 10, 13. The Court is requested to consider what was said by the dissenting Justices.

United States v. *Nugent*, 346 U. S. 1 at 6 (1953), states that the statute is satisfied when, in the Department of Justice proceedings from the original FBI investigative report, the registrant is supplied "with a fair résumé of any adverse evidence in the investigator's report." Compare *Simmons* v. *United States*, 348 U. S. 397 at 403-404 (1955). It has heretofore been demonstrated that both the *Nugent* and *Simmons* cases (*supra*) did not exclude the favorable evidence summary but they dealt only with the use of adverse evidence without giving notice thereof. It was not contended by the respondents in the *Nugent* case (*supra*) that a résumé of the favorable evidence should be supplied to them because no résumé or summary had theretofore been given to the registrants in those cases. It was not then the practice of the Department of Justice to give any kind of summary or résumé whatever, as has been the practice since *Nugent* (346 U. S. 1 (1953)).—See *Simmons* v. *United States*, 348 U. S., pp. 403-404.

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[31] See *N. L. R. B.* v. *Adhesive Products Corp.*, 258 F. 2d 403 (2d Cir. 1958); *Powhatan Mining Co.* v. *Ickes*, 118 F. 2d 105 (6th Cir. 1941); *N. L. R. B.* v. *T. W. Phillips Gas & Oil Co.*, 141 F. 2d 304, 306 (3d Cir. 1944); *Columbia Products Corp.*, 48 N. L. R. B. 1452 n. 1 (1943); *Great Atlantic and Pacific Tea Co.*, 118 N. L. R. B. 1280 (1957); *Communist Party of U. S.* v. *Subversive Act. Con. Bd.*, 254 F. 2d 314 (D.C. Cir. 1958).

The question of whether the favorable evidence should be summarized, while argued tangentially in *Nugent* (346 U. S. 1), was never sharply presented to this Court and was never considered in *Nugent* (346 U. S. 1) and *Simmons* (348 U. S. 397). The main thing that was argued in those cases was the violation of the rights of the registrants in the execution of the outstanding Department of Justice policy through reference only—without summary—to the adverse evidence relied upon by the Department and appearing in the FBI report. It is submitted that this Court has not yet determined in any case that a registrant is not entitled to the favorable evidence. The question is an open one that should be determined according to congressional intent, statutory interpretation and the rules of procedural due process to which Congress is dedicated. The need of the favorable evidence has heretofore been discussed in this brief, pages 43-54, 58-62, *supra*, to which the Court is here referred.

But let it be assumed, for the purpose of argument, that the Court did hold (1) that all that was required was the giving of a summary of the adverse evidence and (2) it was not necessary to supply any of the favorable evidence appearing in the FBI report. If this was the holding of the Court in *Nugent* (346 U. S. 1), then it is here challenged. It is contrary to the spirit of the Constitution and the intent of Congress. Both require that the favorable, as well as the unfavorable, evidence be produced at an administrative hearing such as that of the Department of Justice in conscientious objector cases. This procedure is unlike the secret proceeding involved in *Norwegian*

Nitrogen Products Co. v. *United States,* 288 U. S. 294 (1933).

The Court erroneously held in *United States* v. *Nugent,* 346 U. S. 1 at pp. 7-8 (1953), that the hearing in the Department of Justice is similar to that involved in *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294 (1933) (cited in footnotes 12 and 16, 346 U. S., pp. 8, 10). The Court there stated that the recommendation of the Department of Justice was not binding upon the appeal board but was only advisory and similar to the recommendation involved in the *Norwegian Nitrogen* case (*supra*).

The vast difference between the two (*Nugent* and *Norwegian Nitrogen*) is that the recommendations of the Department of Justice in the conscientious objector draft cases become the link in a chain of administrative proceedings that ultimately brings the registrants into judicial proceedings based thereon in the District Court. He must answer criminal charges based on the administrative proceedings. In the *Norwegian Nitrogen* case (288 U. S. 294) the evidence was only for the confidential use of the President in fixing tariff rates, which was a function that did not involve liberty of the person, as does the proceeding here. The presidential policy was not enforced in the courts, as is the order here. No person had the right to complain of the recommendation in the *Norwegian Nitrogen* case, as does petitioner here in defense to an indictment.—See *Sicurella* v. *United States,* 348 U. S. 385 (1955); *Simmons* v. *United States,* 348 U. S. 397 (1955); *Gonzales* v. *United States,* 348 U. S. 407 (1955).

There is a wide difference between the proceedings in *Nugent* (346 U. S. 1) and the proceedings in the *Norwegian Nitrogen* case (288 U. S. 294). The *Norwegian Nitrogen* case dealt with a determination made by the United States Tariff Commission fixing a new rate of duty. The Commission was performing only an unreviewable legislative function. That case involved the disclosure of trade secrets in the legislative hearing that would have seriously injured the industry involved in the United States. Here the Department of Justice inquiry and hearing deals directly and exclusively with one registrant in proceedings that are made the basis of a criminal case. Such was not the situation in the *Norwegian Nitrogen* case.

Under the draft law the conscientious objector has a right to a hearing. In the *Norwegian Nitrogen* case (288 U. S. 294) the hearing could not be "demanded as of right." (288 U. S. at p. 304) In *Norwegian Nitrogen* the legislative action could be taken without "impeachment on the score of invalidity" and without "notice to those affected." (288 U. S. at p. 304) Here the action without notice which (288 U. S. at p. 304) "has been omitted altogether" is invalid. —*Gonzales* v. *United States*, 348 U. S. 407 (1955).

In *Norwegian Nitrogen* there was no right to judicial review; whereas under the draft law judicial review is required by the Constitution and the "fair and just" provisions of the Act. (*Estep* v. *United States*, 327 U. S. 114 (1946)). *Norwegian Nitrogen* (288 U. S. 294) did not involve personal liberty; whereas under the draft law the Department of Justice proceedings are a link in the chain that results in the loss of liberty or "all that makes life worth living."—*Ng Fung Ho* v. *White*, 259 U. S. 276 at page 284 (1922); see also *Kwong Hai Chew* v. *Colding*, 344 U. S. 590 (1953); *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 77 (1936).

Even the act involved in *Norwegian Nitrogen* (288 U. S. 294) provided for administrative procedure to protect the importer, following the adoption of the act, which required an administrative hearing that was not involved in the case.—288 U. S. at pages 315-316.

Reliance upon the *Norwegian Nitrogen* case (288 U. S. 294) in *Nugent* (346 U. S. at pages 8, 10, footnotes 12, 16) is criticized extensively in an article by Bernard Schwartz on "Administrative Law."[32]

The Court in *Nugent* (346 U. S. 1 at 10, note 16) also cites *Williams* v. *New York*, 337 U. S. 241 (1949), as applicable. That case involved the right of the judge to conceal confidential evidence about a murderer on a pre-sentence investigation. The investigation concerned a gangster who had accessories and friends who were ex-convicts. Concealment in that case was to protect informers against reprisal. No such element of danger is involved in the inquiry and hearing conducted in the case of a conscientious objector. The *Williams* case (337 U. S. 241) involved no legal rights. The pre-sentence investigation dealt only with a matter that was exclusively within the discretion of the judge. The conscientious objector inquiry under the Act is conducted by a division of the Department of Justice separate and distinct from enforcement of penal sanctions of the Act. Compare Duggan, *The Legislative and Statu-*

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[32] "As is always the case where it rejects the individual's claim to an adversary hearing, the Court relied upon *Norwegian Nitrogen Products Co.* v. *United States.* Yet that case does not support the Court's decision. It involved the action of the Tariff Commission prior to an increase by the President of a tariff rate under the flexible tariff provisions of the Tariff Act of 1922. Its action was but a stage in the executive performance of a function clearly legislative in nature—*i.e.*, the increase of a tariff rate. It is well recognized that there is no constitutional right to be heard prior to most agency exercises of legislative authority and, even if a statute requires a hearing, unless the statute expressly says so, the hearing need not be the formal adversary type required prior to agency adjudications. That is all that the *Norwegian Nitrogen* case stands for. Its rule is inapplicable to a case like the instant one where the agency action at issue was a stage in the performance of an adjudicatory function. It is most unfortunate that Mr. Justice Cardozo's masterly opinion in *Norwegian Nitrogen* has been used in a manner never intended by its author. All he sought to show was that the hearing required by Congress in connection with exercises of the tariff-fixing function (one legislative in nature) need not be, unless Congress specifies otherwise, of the formal adversary type. But the Court, as in the instant case, has used Mr. Justice Cardozo's opinion to support it whenever it has held that a full hearing was not required—a use that involves an unwarranted extension of Mr. Justice Cardozo's reasoning."—29 NEW YORK U. L. REV. 101, at pages 107-108 (1954), by Bernard Schwartz, Professor of Law and Director of the Institute of Comparative Law, New York University School of Law; Editor of the Administrative Law Bulletin, Section on Administrative Law, American Bar Association.

tory Development of the Federal Concept of Conscription for Military Service, page 113, footnote 111, Washington, The Catholic University of America Press, 1946. The discretion of the court in *Williams* (337 U. S. 241) was unreviewable; whereas, the Department of Justice procedure under the Act is subject to judicial review.—*Sicurella* v. *United States*, 348 U. S. 385 (1955); *Simmons* v. *United States*, 348 U. S. 397 (1955); *Gonzales* v. *United States*, 348 U. S. 407 (1955).

How could this Court in *United States* v. *Nugent*, 346 U. S. 1, 10 (1953), tell the world that the authors of the Constitution intended to permit the religious objectors to be treated as though they were convicts? This is justifiably gathered from the citation of *Williams* v. *New York*, 337 U. S. 241 (1949), at 346 U. S. at 10 (note 16). It is obvious that there is no comparison between a judge's right to keep secret informers' statements in a pre-sentence report on a convict and the use of a pre-hearing FBI report on a religious objector.[33]

The authors of the Constitution and of the draft law were familiar with the national policy to be fair and liberal with the religious conscientious objector. None of them had in mind the desire to treat them as criminals in time of war, as apparently this Court regarded them in *Nugent* (346 U. S. 1). The Court emasculated the intention of the Act to be liberal to conscientious objectors. This alone is ground for overruling *Nugent.*[34]

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[33] In *Gonzales* v. *United States*, 348 U. S. 407 (1955), this very section of the Act (50 U. S. C. App. § 456(j)) and of the Regulations (32 C. F. R. § 1626.25) prescribing the Department of Justice procedure are held to contemplate "underlying concepts of procedural regularity and basic fair play." (348 U. S. at 412) See footnote 4 where *Williams* v. *New York*, 337 U. S. 241 (1949), and *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294 (1933), are held to be inapplicable because they "do not involve individualized fact finding and classification, but legislative determinations, political judgments, and the exercise of judicial discretion in the imposition of sentence." This holding of this Court (348 U. S. at 412) seems to support the above argument by petitioner. It is in direct conflict and overrules the two cases as authority for *United States* v. *Nugent*, 346 U. S. 1, 8, 10 (1953), where they are cited (notes 12 and 16), thus removing their support for *Nugent* and now requiring the Court to reconsider *Nugent*.

The man making a claim under the statute is making a claim as a man of religion. Involved only are his religious practice, general habits, character and good faith. This is not a search for law violation. Persons who give information on such matters are not informers, in the true meaning of the word. See what *Wigmore on Evidence* (3rd ed.) says at section 2374(f), entitled "Privilege for Communications by Informers to Government."

A general refusal to disclose the identity of witnesses in the FBI report in every case may be harmful in many ways. Sometimes there may be adverse evidence based upon difference in religious interpretations. A man might be attending a church different from the one in which he has membership. A person might draw a conclusion about an objector without knowing him well, but basing his conclusion upon his own predilections. One might be misunderstood or misquoted by the FBI. A neighbor might have a son in the military service and try to hurt the case of a conscientious objector who he feels should not have a better status than his son. There are many other reasons that have nothing to do with law violation.

Such matters as names and addresses ought to be disclosed at the hearing before the Department of Justice since law violations are not involved and there is no question of reprisal. A claimant to conscientious objector deferment would quickly reveal his claim as false if he undertook, in some way, to seek reprisals against any witness for the FBI.

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[34] Various law review articles have criticized this decision because of its treatment of the investigation of a conscientious objector the same as though there were involved investigations affecting national security. All of such law reviews have emphasized the fact that there is no injury whatever to the national interest in disclosing investigative reports on the character of religious objections such as those involved in conscientious objector cases.—62 Yale L. Jour. 1163, 1194-1196 (1953); 34 Indiana L. Jour. 441, 445-451 (1959); 12 U. Miami L. Rev. 221, 224-227 (1958); 29 New York U. L. Rev. 511-513 (1954); 20 U. Chicago L. Rev. 441. 446-448 (1953).

It is said by the Court in *Nugent* (346 U. S. at 9) that if the FBI report is produced it will mean a full-scale trial before the hearing officer. This does not mean that. While the hearing officer might have the right to subpoena witnesses, if authorized by the Department of Justice, the very least that the disclosure of the FBI report would mean is the right of the registrant to answer the adverse evidence and not cross-examine witnesses. If he cannot answer the evidence, then the proceeding is worse than no hearing at all.

The dangers and trouble that the Court foresaw in *Nugent* (346 U. S. at pages 9-10) as impeding the draft law are purely imaginary. A "full-scale trial" will not result from a disclosure of the FBI reports. There are ways in which the administrator might prevent the slowing up of the draft law or prolix proceedings or a "trial." All that is required by due process is that the evidence be made known and that a full and fair hearing be given. When the registrant has had the right to answer this, together with a full and fair hearing, it would be enough. It is not necessary to have a full formal judicial trial.

Petitioner emphasizes the fact that Congress did not intend to provide a "trial" in its judicial sense. Whether the investigation and hearing be termed a trial or a proceeding is immaterial. There is one thing certain; even though a trial was not intended, secretive evidence also was not intended to be used at the hearing.

The Court, therefore, was in error when it seized upon expediency and practicality and manufactured the bugaboo of a "full-scale trial" which is not involved. The draft law will not be defeated by compliance with the requirements of due process of law. There is a vast difference between giving a person all the evidence in an administrative proceeding and a judicial trial. The opportunity to use the evidence does not necessarily mean a judicial trial.

There is absolutely no support, therefore, for the holding in *Nugent* (346 U. S. at page 10) that to produce the

FBI report amounts to "litigious interruption." All that the hearing officer would have to do would be hand the FBI report to the conscientious objector. This would take no more than a few seconds. The registrant could then read it on the spot. This would take no more than a few minutes. Then the objector could answer or rely upon it. This would not take long. The hearing officer could limit the time, as this Court does on oral argument. Then justice and fair play would be accomplished. It would not take longer than a few minutes for justice and fair play to be done. How can it be said that just a few minutes is "litigious interruption"? Why is the Department of Justice in such a big hurry that it cannot take the time to be fair?

The delay that the Court complains of in *Nugent* (346 U. S. at pages 9-10) is a delay that was provided for by Congress. The conscientious objectors did not manufacture the delay. Congress provided for the investigations. This takes considerable time usually. Congress provided for a reasonable time to process a case in the Department of Justice, including the hearing, the report and the recommendation to the appeal board. Congress and the Constitution demanded that the hearing be fair and not be a sham. Did not the Court in its opinion in *Nugent* (346 U. S. at page 7) say that the hearing could not be a sham? It is a sham, however, when the Department of Justice is permitted to keep the FBI reports hidden, on the pretext that it would be "litigious interruption." There is absolutely no basis for the statement in *Nugent* (346 U. S. at page 10) that producing the FBI report is "litigious interruption."

The Court in *Nugent* (346 U. S. 9-10) to lay a ground for the assertion that it would delay, assimilates the word "hearing" to the right to subpoena the witnesses named in the FBI report before the hearing officer and have them give testimony and submit to cross-examination. The respondents in *Nugent* (346 U. S. 1) never made any such argument. They argued to the contrary. Read what was said on pages 82-83 of the Brief for Respondents (No. 540

and No. 573, October Term, 1952). All that was contended was the right to see, read, answer and use the FBI report, not cross-examine witnesses.

Since the mere uncovering of the hidden hearsay that the Department of Justice stands on in conscientious objector cases does not mean a judicial trial and, inasmuch as the respondents in *Nugent* (346 U. S. 1) did not argue that the objector has the right to cross-examine, then the reference in the opinion to a judicial trial and cross-examination to delay things is entirely irrelevant and immaterial to the case. The talk in *Nugent* (346 U. S. at page 9) about "full-scale trial" presents a state of facts that did not exist. It certainly states an argument that was not made. Since the opinion erroneously lays strong emphasis on a nonexistent argument for the right to full-scale trial, the basis for the opinion withers and becomes devoid of force and meaning.

All the argument about delay and litigious interruption, even if real, is out of the case. Congress provided for the delay by the investigation and hearing. If Congress wanted to cut this out, it could have done so. It did not. How can the Court possibly complain about what Congress provided? The only thing to be decided in *Nugent* (346 U. S. 1) was whether the Department of Justice "star chamber" proceedings violate the Constitution, the Act and the Regulations. Since they do, that should end the matter. This calls for an overruling of *Nugent* v. *United States*, 346 U. S. 1 (1953) by this Court.[35]

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[35] A large number of law review articles, comments and notes have been published about *United States* v. *Nugent*, 346 U. S. 1 (1953). Some of them are: 8 Syracuse L. Rev. 2, 12 (1956); 21 U. Chicago L. Rev. 759 (1954); 101 U. Pennsylvania L. Rev. 692 (1953); 107 U. Pennsylvania L. Rev. 166, 173 (1958); 12 U. Miami L. Rev. 221, 223-227 (1958); 50 Northwestern U. L. Rev. 660, 671-676 (1955); 4 DePaul L. Rev. 296, 303-306 (1955); 34 Indiana L. Jour. 441, 446-451 (1959); 29 New York U. L. Rev. 511 (1954); 29 New York U. L. Rev. 101, 106-108 (1954); 33 New York U. L. Rev. 1296 (1958); 68 Harvard L. Rev. 380 (1954); 62 Yale L. Jour. 1163, 1194-1196 (1953); 20 U. Chicago L. Rev. 441, 446-448 (1953); see also Davis, *Administrative Law Treatise*, Vol. 1, Ch. 7, § 7.14, pp. 473-478, § 7.20, pp. 510-511 (West Pub. Co., 1958).

Should we adopt the view that Congress did not intend that the FBI report should be revealed to a registrant, then we are attributing to Congress an intention to defeat its own purpose. Congress knew the history of conscientious objection and, beginning in 1940, extended the class of conscientious objectors to include all religious objectors and not only those connected with historic peace churches. An interpretation that would restrict the recognition of conscientious objectors not in accordance with the wishes of Congress ought not to be tolerated.

By allowing the Department of Justice to conceal the FBI report there is put into its hands a dangerous weapon. A hearing officer has power to make his report according to his own prejudice, bias or whim. He can ignore favorable evidence and magnify minor things into monstrosities. He can draw unfavorable conclusions without the registrant having a chance to know or meet them. The Department of Justice can make its report to the appeal board so strong that the registrant has no chance, even when he might be able to show otherwise from the original FBI report. The Department of Justice has a tremendous influence upon the decision of the appeal board, even though the recommendation is only advisory.—Smith and Bell, "The Conscientious-Objector Program—A Search for Sincerity," 19 U. Pittsburgh L. Rev. 695, at page 702 (1958), showing the recommendation is followed in over 90% of the cases; see also footnote 11, *supra*, page 28.

How many religious objectors have been sent to jail because the FBI report has been concealed nobody knows. But just because we cannot be specific is no reason to believe that justice has been done under a system of concealment. The public gets a wrong impression when conscientious objectors are sent to jail. They feel that the man has been disallowed his claim because he is a "draft dodger." This brings the cause of conscientious objection into disrepute and should not be allowed without the results of the FBI investigation being made known to the registrant. Overzealous hearing officers, in a time of stress, might make such flagrant reports of conscientious objectors, based upon secret evidence, that the cause itself could be seriously impaired, if not endangered.

By concealing FBI reports a religious man is put at the mercy of the atheist, the evil-minded and the base. It comes to the point where any person desirous of dealing religion a black eye can with impunity attack a man's conscientious scruples. The religious objector has no defense to this without knowing the evidence, and the chances are that he will go to jail because an unscrupulous person is believed and a rebuttal is deemed unnecessary. While administrative hearings are not judicial trials they should be conducted in the open, to avoid the injustices mentioned above. On this see 59 Yale L. Jour. 1451 (1950), at page 1466: "Suppression of evidence has little to commend it on any theory, and it is even less defensible when the Government litigates with its own citizens."

The FBI report often is filled with hearsay and adverse statements made by witnesses who may hate or despise the registrant rather than love him as their neighbor. The report may be glutted with conclusions and opinions. It may be filled with damaging name-calling, slurs from persons based on rumors, malice, gossip and hearsay.

It is the policy of the FBI to take statements of any kind and character from any person. (See Hoover, "The Confidential Nature of FBI Reports," 8 Syracuse Law Review 2, 3 (1956).) The FBI does not censor the evidence that it receives. Every kind and character of statement without regard to its legality, source or effect is incorporated in the report.

These reports are handed to the hearing officer. Regardless of how honest the hearing officer may be, it tries his integrity to the limit not to be influenced by this poison that is turned over by the FBI without regard to the rules of evidence.

Since the hearing officer and the review officer must of necessity be influenced by this evidence there is every reason under the sun why the FBI report must be submitted to the registrant so that he might help the hearing officer do his duty and protect himself. All of this unlimited poisonous material appearing in the FBI report should be qualified by the registrant. If it is not explained away then it will be used against him in the criminal proceedings. This is true, however, though the proceedings are administrative. They ultimately become the basis for criminal prosecution. This poisonous adverse evidence is used against the registrant in criminal proceedings, therefore, without his ever having had an opportunity to rebut the charges, either in the administrative proceedings or in the criminal proceedings against him.

The Government will contend that the evidence in the FBI report comes from persons close to the registrant such as friends, neighbors, teachers. It says these are important checks upon the registrant's statements and those of his selected witnesses. It then will go on to say that these friends are the very informants who do not want to disclose evidence unless their identity is hidden.

If a person reports that he is a friend of the registrant and is willing to give adverse information against his friend but will conceal from the registrant the fact that he has given adverse information, this proves such person is not a friend but is an enemy. Should the Department attach such weight to adverse evidence, basing it upon an elusive supposition furnished? The very fact that a witness refuses to disclose his identity is basis for rejecting his entire testimony. The only exception to this is in cases where his life may be endangered by giving information about a criminal or gangster.

A conscientious objector is not a criminal or gangster. He is "the friend of the informant."

The Government will argue that persons interviewed by the FBI are persons "close" to the registrant. The Government will go a step further and say that these "close" persons always have intimate knowledge of the registrant. A distinction should be made between the close friends and neighbors. A man may have many neighbors who live close by him; yet they will not know very much about him, not so much as close friends and business associates in very distant places. It is a well-known fact that in many cities and towns neighbors know very little about each other. It is entirely different from small communities and country areas. The Government's use, therefore, of "close persons" to the registrant should be taken with this qualification.

The Government places a great deal of weight on the argument it makes in these cases that it is necessary to keep the identity of the informants secret. It is said that precise evidence so as to make a disclosure is unnecessary.

The Government will state that at best the Department of Justice will be hindered in formulating recommendations if there is a disclosure of the names of persons who furnish the information. Are we to deprive registrants of the truth? Surely a report can be made even where witnesses are subjected to a disclosure of their names.

The Government says that people who give evidence to the FBI are unwilling to submit to impeachment or cross-examination. The convenience of informants not to have the truthfulness of their statements questioned does not outweigh the tremendous injury that is committed against the victim of secret evidence. If this type of consideration is accepted by the Court, it means permission to administrative agencies to side-step due process of law. Then the end of due process is at hand and the return to the ancient and condemned star chamber proceedings is here.

The Court has allowed in *Nugent* (346 U. S. 1) this sort of administrative proceedings to be established and the end of truth has occurred. It is more important that truth be the aim of a hearing. Even though evidence is subjected to contradiction, it is better that truth be preserved in the administrative agency. If evidence can be furnished to an administrative agency without being submitted to impeachment, then it will encourage lying, perjury, malice, gossip and all manner of violations of rights and liberties. There would be no end to its evil consequences.

Unless and until the report is made available, the intent of Congress is not completed. Under the Act and Regulations petitioner was entitled to have all of the favorable evidence made available, as much as he is entitled to be confronted with and answer any unfavorable evidence. The record was not complete since the Department of Justice deliberately tore out of the record a great part of the case. It was a gaping hole that vitiated the entire administrative process.

It is submitted that this Court ought to overrule *United States* v. *Nugent,* 346 U. S. 1 (1953), and here and now set it aside and hold it for nought. The Act and the Regulations should be construed in such a way as to afford the registrants who are conscientious objectors the right to have produced and made a part of the draft board file the full and original FBI reports because it was contemplated by the Act and is required by the guarantee of due process of law contained in the Fifth Amendment to the United States Constitution.

CONCLUSION

It is submitted, therefore, that the judgment of the court below, affirming the judgment of conviction of petitioner in the United States District Court for the District of Colorado, should be reversed and a mandate should issue commanding the District Court to render and enter a judgment of acquittal; or, in the alternative, the case should be remanded to the District Court for a new trial because of the errors of the District Court in sustaining the motion to quash the subpoenas *duces tecum* calling for the production of the hearing officer's report and the original FBI investigative reports.

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February, 1960.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

5 U. S. C. § 22

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers and property appertaining to it. [This section does not authorize withholding information from the public or limiting the availability of records to the public.]"—R. S. § 161, 16 Stat. 283 (1872), 5 U. S. C. § 22 (1952) [Section amended by adding sentence appearing within brackets, *supra*, Aug. 12, 1958, Pub. L. 85-619, 72 Stat. 547, 5 U. S. C. § 22 (1958)].

50 U. S. C. App. § 451(c)

"The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—62 Stat. 604 (1948), 65 Stat. 75 (1951), 50 U. S. C. App. § 451(c) (1952).

50 U. S. C. App. § 456(j)

"Nothing contained in this title [sections 451-470 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—62 Stat. 609 (1948), 65 Stat. 83 (1951), 50 U. S. C. App. § 456(j) 1952.

50 U. S. C. App. § 460(b)(3)

"* * * [L]ocal boards * * * shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken * * *. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. * * *"—62 Stat. 618 (1948), 64 Stat. 1074 (1950), 65 Stat. 87 (1951), 50 U. S. C. App. § 460(b)(3) (1952).

50 U. S. C. App. § 462(a)

"Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *."—62 Stat. 622 (1948), 50 U. S. C. App. § 462(a) (1952).

32 C. F. R. § 1622.14

"*Class I-O: Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.* (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

"(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

"Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."—32 C. F. R. § 1622.14; E. O. 10420, 17 F. R. 11465, 11593, Dec. 19, 1952 (Section 1622.14(b) contained in E. O. 10292, 16 F. R. 9862, Sept. 28, 1951).

32 C. F. R. § 1626.25

"*Special provisions when appeal involves claim that registrant is a conscientious objector.* (a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained it shall recommend to the appeal board that such objections be not sustained.

"(c) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that, within 30 days after the date of such mailing, he may file with the appeal board a written reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant."—32 C. F. R. §1626.25; E. O. 10363, 17 F. R. 5449, 5451, June 18, 1952; paragraphs (a) and (c) as amended by E. O. 10659, 21 F. R. 1103, Feb. 17, 1956 (see also footnotes 13 and 14 (pages 31, 32, *supra*)).

Department of Justice Order No. 3229, Revised

"PRODUCTION OR DISCLOSURE OF MATERIALS OR INFORMATION

JANUARY 13, 1953.

"Pursuant to authority vested in me by R. S. 161 (5 U. S. C. 22), it is hereby ordered:

"1. When a United States Attorney or any other officer or employee of the Department of Justice is served with a subpoena or order for the production or disclosure of materials or information contained in the files of the Department, the United States Attorney, or such other attorney as may be designated, will appear with the person upon whom the demand is made and inform the court or other issuing authority that such person is not authorized to produce or disclose the materials or information sought. Time will be requested within which to refer the subpoena or order to the Attorney General, and the United States Attorney or other attorney designated will refer the court to this order as published in the FEDERAL REGISTER. Advice as to such subpoena or order will be given immediately to the Attorney General without awaiting court appearance.

"2. In the event the court declines to defer a ruling until instructions from the Attorney General have been received, or in the event the court rules adversely on a claim of privilege asserted under instructions of the Attorney General, the person upon whom such demand is made will, pursuant to this order, respectfully decline to produce the material or information sought. United States ex rel Touhy v. Ragen, 340 U. S. 462.

"3. Order No. 3229 (dated May 2, 1939) and Supplements 1, 2, 3, and 4 thereto (dated December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, respectively), heretofore in effect, are hereby revoked.

"JAMES P. MCGRANERY,
Attorney General."

—18 F. R. 1368 (1953).

Department of Justice Order No. 3464 (Supplement No. 4, Revised Jan. 13, 1953)

"1. All official files, documents, records, and reports in the Department of Justice shall be regarded as of a confidential nature, and the content thereof shall be disclosed only in the performance of official duties.

"2. Except upon specific authorization of the Attorney General, no officer or employee shall furnish to any person outside the Department of Justice:

"(1) any information obtained from the Federal Bureau of Investigation;

"(2) any information obtained from any other investigative report of the Department;

"(3) any other information contained in the files of the Department the disclosure of which, in the opinion of the officer having custody of such files, might be injurious to the public interest. . . ."

—See also 8 SYRACUSE L. REV. 2, 11 (1956).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America
vs. — C 155-223
James Wilson Parmiter,
Defendant.

United States of America
vs. — C 155-221
Fred August Heise,
Defendant.

United States of America
vs. — C 155-219—file
Richard Secor Corliss,
Defendant.

United States of America
vs. — C 155-222
Walter Herold,
Defendant.

Defendants, having moved this Court on April 10, 1958 for an order directing the respective Hearing Officers of the Department of Justice to produce for examination, inspection and copying, the minutes or notes of hearings conducted by said Hearing Officers and said motions having come on to be heard on June 2, 1958, now on reading and filing the notices of motion dated April 10, 1958, the affidavits annexed thereto, the affidavits in opposition, and upon all the papers and proceedings heretofore had herein, and after hearing HERMAN ADLERSTEIN, Esq., attorney for defendants, in support of the motions, and PAUL W. WILLIAMS, United States Attorney, by ALBUM C. MARTIN, Assistant United States Attorney, in opposition, and the opinion of the Court granting said motion dated June 23, 1958.

Now, on motion of ARTHUR H. CHRISTY, United States Attorney, by ALBUM C. MARTIN, Assistant United States Attorney, it is

ORDERED, that the respective Hearing Officers of the Department of Justice named in the moving papers, are directed to produce for examination, inspection and copying the minutes of the hearings conducted by them with the respective defendants, if such minutes were taken or kept by said Hearing Officers, and it is further

ORDERED, that said minutes shall be produced at the office of the United States Attorney in the United States Court House, Foley Square, New York, New York, within ten days of the entry of this order.

Dated: New York, New York, January 20th, 1959.

DAVID N. EDELSTEIN

United States District Judge.

FILE COPY

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FILED
APR 8 1960
JAMES R. BROWNING, Clerk

No. 416

In the Supreme Court of the United States

OCTOBER TERM, 1959

[illegible] [illegible], JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
[illegible],
Attorneys,
Department of Justice,
Washington 25, D.C.

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In the Supreme Court of the United States

October Term, 1959

No. 416

Raymond Gonzales, Jr., petitioner
v.
United States of America

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 186–193) is reported at 269 F. 2d 613.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1959 (R. 194). On August 24, 1959, Mr. Justice Whittaker entered an order extending the time for filing a petition for a writ of certiorari to and including September 25, 1959 (R. 195). The petition was filed on September 21, 1959, and was granted on November 23, 1959 (R. 195; 361 U.S. 899). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's finding—that the selective service board's record of petitioner's personal appearance before it was accurate—is supported by the evidence.

2. Whether the administrative procedures for determination of petitioner's claim to exemption as a conscientious objector were in accord with the statute and due process.

3. Whether petitioner was entitled to production of the hearing officer's report at his trial.

4. Whether petitioner was entitled to the F.B.I. reports before the Department of Justice hearing or at the trial.

STATUTE, REGULATIONS AND ORDERS INVOLVED

1. The pertinent portions of the Universal Military Training and Service Act, 62 Stat. 604, 612, 622, 64 Stat. 1072, 1075; 65 Stat. 75, 86, provide:

Section 6(j) [50 U.S.C. App. 456(j)]:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. * * * Any person claiming ex-

emption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of

Justice together with the record on appeal from the local board. * * *

Section 10(b)(3) [50 U.S.C. App. 460(b)(3)]:

> * * * [L]ocal boards * * * shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken * * *. The decision of * * * appeal boards shall be final in cases before them on appeal unless modified or changed by the President. * * *

Section 12(a) [50 U.S.C. App. 462(a)]:

> Any * * * person * * * who * * * refuses * * * service in the armed forces * * * or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

2. The pertinent regulations and orders provide:

32 C.F.R. (1954 rev.) 1623.1(b):

> The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file * * *. Since it is imperative that appeal agencies have available to them all information on which the local board determined the registrant's classification, oral information shall not be considered unless it is summarized in writing and the summary placed in the registrant's file. * * *

32 C.F.R. (1954 rev.) 1624.2:

> *Appearance before local board.* * * *
>
> (b) At any such appearance, the registrant * * * may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant and, in either event, shall be placed in the registrant's file. * * *

32 C.F.R. (1954 rev.) 1625.1(b):

> Each classified registrant * * * shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification * * *.

32 C.F.R. (1954) rev.) 1626.12:

* * * The person appealing may attach to his appeal a statement specifying the matters in which he believes the local board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file.

32 C.F.R. (1958 Supp.) 1626.24(b):

(b) In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:

(1) Information contained in the record received from the local board.

(2) General information concerning economic, industrial, and social conditions.

(3) Any advisory recommendation from the Department of Justice under § 1626.25.

(4) Any reply to the recommendation of the Department of Justice received from the registrant under § 1626.25.

32 C.F.R. (1954 rev.) 1626.25(a)(2):

* * * If * * * the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file * * * for the purpose of securing an advisory recommendation from the Department of Justice.

32 C.F.R. (1954 rev.) 1626.25(b):

Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraph (a) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. * * * If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

32 C.F.R. (1954 rev.) 1626.25(c):

Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the letter containing the recommendation of the Department of Justice.

DEPARTMENT OF JUSTICE ORDER NO. 3229, REVISED

Production of Disclosure of Materials or Information.

JANUARY 13, 1953.

Pursuant to authority vested in me by R.S. 161 (5 U.S.C. 22), it is hereby ordered:

1. When a United States Attorney or any other officer or employee of the Department of

Justice is served with a subpoena or order for the production or disclosure of materials or information contained in the files of the Department, the United States Attorney, or such other attorney as may be designated, will appear with the person upon whom the demand is made and inform the court or other issuing authority that such person is not authorized to produce or disclose the materials or information sought. Time will be requested within which to refer the subpoena or order to the Attorney General, and the United States Attorney or other attorney designated will refer the court to this order as published in the Federal Register. Advice as to such subpoena or order will be given immediately to the Attorney General without awaiting court appearance.

2. In the event the court declines to defer a ruling until instructions from the Attorney General have been received, or in the event the court rules adversely on a claim of privilege asserted under instructions of the Attorney General, the person upon whom such demand is made will, pursuant to this order, respectfully decline to produce the material or information sought. United States ex rel Touhy v. Ragen, 340 U.S. 462.

3. Order No. 3229 (dated May 2, 1939) and Supplements 1, 2, 3, and 4 thereto (dated December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, respectively), heretofore in effect, are hereby revoked.

James P. McGranery,
Attorney General.

DEPARTMENT OF JUSTICE ORDER NO. 3464
(SUPPLEMENT NO. 4, REVISED JAN. 13, 1953)

1. All official files, documents, records, and reports in the Department of Justice shall be regarded as of a confidential nature, and the content thereof shall be disclosed only in the performance of official duties.

2. Except upon specific authorization of the Attorney General, no officer or employee shall furnish to any person outside the Department of Justice:

(1) any information obtained from the Federal Bureau of Investigation;

(2) any information obtained from any other investigative report of the Department;

(3) any other information contained in the files of the Department the disclosure of which, in the opinion of the officer having custody of such files, might be injurious to the public interest. * * *

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Tenth Circuit (R. 194) affirming the judgment of the District Court for the District of Colorado. The district court found petitioner guilty, upon trial before the court without a jury, of refusal to serve in the armed forces, in violation of the Universal Military Training and Service Act, Section 12(a), *supra*, p. 4 (R. 14–16). Petitioner was sentenced to fifteen months' imprisonment (R. 16).

The record may be summarized as follows:

1. Petitioner registered under the Selective Service System on March 17, 1952, stating his occupation as the cut stone business and as minister for Jehovah's Witnesses (R. 127). On October 31, 1952, he filed his classification questionnaire claiming classification IV-D as a minister (R. 135), and stating that he had served as a minister of Jehovah's Witnesses since August 14, 1948, having been formally ordained on April 3, 1949 (R. 131). The questionnaire, on its first page, instructed the registrant to report to the local board any "new fact" which "may affect" his classification (R. 129).

In a letter also filed on October 31, 1952, petitioner stated that he was a "full-time minister spending a minimum of 100 hours a month in actual preaching," that he also served as Theocratic Ministry School Instructor and Stock Servant at the Longmont, Colorado, company,[1] that his temporary night employment at a sugar mill allowed time for the preaching work (R. 137), and that he opposed participation in war in any form (R. 135). Petitioner's file also includes letters from the Watchtower Bible and Tract Society, dated April 17, 1951, March 1, 1952, and October 1, 1952, stating his appointment as Stock Servant, School Servant, and Pioneer, respectively (R. 138-143). The letter of October 1, 1952, stated that being a Pioneer meant that petitioner was a "full-time minister" required to serve one hundred hours a month in the field going from house to house[2] (R. 142–143).

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[1] A "company" is a congregation of Jehovah's Witnesses.

On November 5, 1952, petitioner filed his Special Form for Conscientious Objector (R. 151–155). On November 13, the local board nevertheless classified him I–A (R. 136). On November 22, 1952, petitioner wrote the board, protesting this classification. He again stated that he was "a regular minister," that he was "devoting an average of 100 hours a month to actual preaching publicly" in addition to fifty to seventy-five hours in other ministerial duties, and that he opposed war in any form (R. 146). On December 4, 1952, petitioner was classified I–O (R. 136). On April 1, 1953, after six months of the full-time Pioneering, he ceased devoting a hundred hours per month to preaching, and was no longer a Pioneer. He did not, however, notify the local board of this change (R. 108–109).

On July 30, 1953, the local board, apparently in a customary periodic review of classifications (R. 42), reclassified petitioner as I–A (R. 136). Petitioner protested upon the basis of the evidence which he had previously submitted as a conscientious objector (R. 159). Following petitioner's personal appearance before the local board on August 13, 1953, the I–A classification was upheld because of petitioner's willingness to kill in defense of his church and home (R. 161). After a hearing before the Department of

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[2] The letter stated that other jobs were permitted only if "necessary to continue in full-time service" and cannot be allowed to "overshadow your service as a minister" (R. 142).

Justice, the appeal board sustained the classification of I–A, and notice of the decision was mailed to petitioner on April 5, 1954 (R. 136).[3] In connection with this appeal, a résumé of the investigative report of the F.B.I., accompanying the recommendation of the Department of Justice, included the statement that the headquarters of the Jehovah's Witnesses had reported that petitioner was no longer devoting one hundred hours per month to preaching and had relinquished his position both as a Pioneer and as a Bible Study Servant (R. 165). Petitioner apparently did not know that this information was in the file, since he later testified that he did not receive or see this résumé (R. 105), and that he did not review his file with the local board (R. 109–110).

On May 2, 1956, the local board mailed a marital form to petitioner (R. 136). Petitioner replied stating that he was now self-employed at masonry work in Colorado Springs and that "[a]s you already know, I am an active member" of the Jehovah's Witnesses unit at Colorado Springs. He did not inform the board of the loss of his Pioneer status (R. 166–167).

Petitioner's case was reopened on the basis of this Court's decisions on March 14, 1955, concerning conscientious objectors (R. 168–169). The local board, after consideration *de novo*, again classified petitioner as I–A (R. 170). At petitioner's personal appearance before the local board on August 17, 1956, petitioner claimed that he was a minister and thereby entitled to IV-D classification (R. 95, 109, 173).[4] He further claimed that the status of minister "automatically" classified him as a conscientious objector, but the local board informed petitioner that this was not correct (R. 95, 173). The board's memorandum of the meeting, filed on the same date as the meeting,[5] further reports that petitioner stated to the board that he was devoting one hundred hours a month to public preaching, an additional fifty to seventy-five hours in preparation for ministerial duties, and that he also served as Stock Servant (R. 173).[6] Petitioner, at the trial, denied having made this statement (R. 95-96). The memorandum further recited, and petitioner admitted at the trial, that he was asked whether he had any new matter to file, and that petitioner filed only the certificate of his marriage (R. 96, 173). He did not then, or at any other time, tell the board that he was preaching only 6½ hours a month.

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[3] This Court's decision in *Sicurella* v. *United States*, 348 U.S. 385—that willingness to fight a "theocratic war" is not inconsistent with conscientious objection—was not handed down until March 14, 1955.

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[4] The local board's memorandum and petitioner's testimony at the trial are identical on this point (R. 95, 109, 173).

[5] The meeting was set for 1:30 p.m. of that day (R. 172).

[6] The statement of petitioner appearing in quotation marks in the board's memorandum of his appearance is in the language of petitioner's earlier letter to the board of November 22, 1952 (see *supra*, p. 11). It does not appear whether the letter was read by petitioner from the file or from a copy, was read to petitioner from the file and reaffirmed by him, or whether the letter was substantially the same as petitioner's extemporaneous remarks.

On administrative appeal, the matter was referred to the Department of Justice for recommendation. Petitioner, prior to the Department hearing, was mailed a résumé of the F.B.I. investigation which stated that petitioner was of good reputation, and that his employer, acquaintances, neighbors and religious associates considered him sincere in his religious beliefs and in his claim as a conscientious objector (R. 46, 178-180). The résumé further stated that petitioner's religious organization reported that he was devoting 6½ hours a month to public preaching (R. 178).[7] At the hearing on January 7, 1957, before Maurice A. Evenson, a hearing officer of the Department of Justice, petitioner did not ask to see the F.B.I. reports and he made no complaint as to the résumé (R. 70, 105). He presented character witnesses and testified himself (R. 86-93, 109-110). The hearing officer concluded that petitioner should be exempt only from combatant training and service since his beliefs opposed such service, but not participation in war in noncombatant form (R. 176).

After the hearing, the Department of Justice recommended to the appeal board on March 21, 1957, that petitioner's claim be rejected as to any exemption (R. 174–177). The recommendation stated that "the registrant's claim as to the amount of his religious activities is so highly exaggerated, if we are to believe the official records of his religious organization as reported in the résumé and recapitulated above, as to cast doubt upon his veracity and, consequently, upon his sincerity and good faith" (R. 177). Petitioner, in his reply to the Department of Justice's recommendation, denied that he had claimed that he was then publicly preaching a hundred hours per month or was then a Stock Servant, during his appearance before the local board on August 17, 1956 (R. 182).

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[7] The résumé also stated that at one time, in April 1956, petitioner was fingerprinted and photographed, but no arrest card was made up. Petitioner explained to the F.B.I. that the police had mistaken him for someone who had attempted to pick up a woman on the street (R. 179-180). The hearing officer informed petitioner that he had observed that petitioner was not arrested nor were any charges filed in connection with this incident, so "it would have no bearing" against petitioner (R. 91).

The appeal board unanimously classified petitioner as I–A, and notice was sent to petitioner of this action on May 14, 1957 (R. 136). On June 3, 1957, petitioner was ordered to report for induction (R. 136). On June 14, 1957, he wrote to the local board, advising it that his wife was pregnant and inquiring whether this would change his draft status (R. 183). The local board wrote petitioner of the regulations providing that the board could not consider the fact of expectant fatherhood if the registrant failed to notify the board until after the order for induction (R. 184).

On June 24, 1957, petitioner refused to be inducted upon the ground of conscientious objection (R. 185; Ex. 1, F. 48).

2. At petitioner's trial in the district court, the government introduced his selective service file in evidence (R. 26–43). Petitioner called as a witness the

hearing officer of the Department of Justice, Maurice Evensen, before whom he had appeared on January 7, 1957 (R. 44). Evensen testified that he had no recollection of any discussion by petitioner of his claims as to time spent in preaching (R. 47). Evensen further testified that he sent petitioner the résumé of the F.B.I. reports (R. 46), that petitioner made no objection to the résumé, and that he made no request to see the reports themselves (R. 70). Petitioner testified (R. 85–111), setting forth the substance of the testimony by himself and his witnesses at the hearing before Evensen and stating his version of his appearance before the local board on August 17, 1956.

Petitioner sought to subpoena Evensen's longhand notes[8] and his report to the Department of Justice, for the purpose of testing whether there had been a denial of procedural due process in petitioner's appearance before Evensen and whether the Department of Justice, in its letter of recommendation, had "withheld" evidence favorable to petitioner (R. 44–45, 75–76). Petitioner did not specify or indicate the existence of any procedural errors or evidence withheld. Upon the motion of the government, the subpoena was quashed, the court observing that Evensen was petitioner's own witness (R. 55–56).[9]

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[8] Petitioner has abandoned his contentions in support of this request.

[9] Petitioner also called as a witness Fred M. Mazzulla, a hearing officer of the Department of Justice, before whom petitioner had appeared on November 4, 1953 (R. 122–123) on the prior appeal (*supra*, pp. 11–12). Mazzulla testified that he had no independent recollection of petitioner's appearance before him (R. 80).

Petitioner also sought to subpoena the original F.B.I. reports to the Department of Justice, in order to disclose favorable evidence (which was not specified by petitioner) not forwarded to the appeal board (R. 83–84; see R. 65–67, 73–74, 76–77). Upon the government's objection that it was not required to furnish the F.B.I. reports (citing *Bouziden* v. *United States*, 251 F. 2d 728 (C.A. 10), certiorari denied, 356 U.S. 927), and that petitioner's request was an unsupported "fishing expedition" (R. 83-84), the subpoena was quashed (R. 84).

The district court found that there was basis in fact for the rejection by the local and appeal boards of petitioner's claim of exemption as a conscientious objector (R. 114–115); that the local board's memorandum of petitioner's statements before it on August 17, 1956, as to hours devoted to preaching, would probably reflect the statements accurately, the memorandum having been made promptly after petitioner's appearance before the board (R. 115);[10] that procedural due process was not denied petitioner at this appearance before the local board, at the hearing be-

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Petitioner requested that the court require Mazzulla to produce his longhand notes and his report to the Department of Justice (summarized in the letter of the Department of Justice dated February 1, 1954 (R. 163)), "to establish what occurred, and as to whether or not [petitioner] was given the procedural safeguards provided by the Selective Service Act and the Constitution" (R. 80). The request was denied (R. 80). Petitioner admits (Pet. Br. 5) that this issue is not before the Court.

[10] The date of petitioner's appearance appears inaccurately as August 16 at this point in the transcript of the district court trial. The actual date was August 17, 1956 (see *supra*, pp. 12–13).

fore Evensen, or by the letter of recommendation from the Department of Justice to the appeal board (R. 115–117). The court held further that the hearing officer's report to the Department of Justice, as distinguished from the Department's recommendation to the appeal board, was not required by the Act, the regulations, or as a matter of due process, to be sent to the appeal board (R. 117).

The court of appeals affirmed the district court's judgment, emphasizing the local board's memorandum of petitioner's statements and petitioner's admitted failure, at the least, to make the full disclosure of his changed status that was required of him (R. 189–190, 193). The court further held that, under *United States* v. *Nugent*, 346 U.S. 1, and *Bouziden* v. *United States*, *supra*, it was not required that petitioner or the appeal board be furnished the reports made to the Department of Justice by the hearing officer and the F.B.I. (R. 191–193).

SUMMARY OF ARGUMENT

I

The Department of Justice, in its advisory recommendation to the selective service appeal board, concluded that petitioner was not entitled to the classification of a conscientious objector. The basis of this recommendation was a memorandum of the local board which stated that petitioner, in a personal appearance before the board, had asserted that he was publicly preaching one hundred hours per month. The Department, comparing this assertion with the undisputed fact that petitioner was publicly preaching only 6½ hours per month, found petitioner's assertion to the local board to be so highly exaggerated as to place in question his veracity and sincerity. Petitioner does not argue that the assertion would not be a sufficient basis in fact to warrant denial of the exemption, but contends, as he did in his reply to the appeal board and in his testimony in the district court, that he did not make the assertion recorded by the local board. This contention is in effect a demand for the acceptance of petitioner's own belated self-serving statement as against the written record of the local board—a contention rejected by the appeal board, the district court, and the court of appeals upon ample evidence.

A. The local board's memorandum concerning petitioner's appearance before it is conceded by him to be correct in important respects, and there is no reason to doubt the remaining part. Petitioner argues that the memorandum, which used the same language as an earlier letter from him to the board, is nothing but a copying of the letter. The memorandum, however, reads, "Mr. Gonzales stated," thereby indicating, as a reasonable inference, that petitioner either read the earlier letter or a copy, or the letter was read to petitioner and reaffirmed by him, or he made a substantially similiar extemporaneous statement.

B. The local board was required by regulation to make a summary of petitioner's personal appearance in order to allow the appeal board to consider the oral information which was presented. Such an official record, made and filed the same day as the appearance, was at least presumptively correct. Now was it, as petitioner claims, made "behind petitioner's back." It was made a part of the board file, and petitioner himself admits that he was aware of his right to examine this file at any time.

C. Petitioner's conduct supports the board's record that he claimed one hundred hours per month of public preaching during his appearance before it. During the entire three-year period that intervened between the cessation of his status as a Pioneer minister leading to the reduction in his public preaching from one hundred to 6½ hours per month in 1953 and his appearance before the local board in 1956, petitioner at no time obeyed the requirement—which appeared on the first page of the questionnaire which he filled out—that he inform the board of any new fact which "may affect" his classification. Moreover, petitioner admits that he expressly claimed ministerial classification during his appearance before the local board, despite the equally undisputed fact, shown by the records of his own religious sect, that he was then preaching only 6½ hours per month and was no longer a Pioneer minister. In fact, even when directly asked whether he had any new matter to present, petitioner informed the board only of the fact of his marriage, without giving any indication of the marked change in his religious position.

Petitioner's nondisclosure cannot be dismissed as mere inadvertence, for, in originally presenting his claim to a ministerial exemption, he had not only written a letter setting forth the one hundred hours devoted to preaching, but had filed the certificate of his status as Pioneer. He could not have been unaware that, whatever his own or his organization's view of what ministerial status might be, his claim to the Selective Service System for ministerial status continued to depend upon the same representations of one hundred hours of public preaching that he had made before.

In summary, the district court had the opportunity to see and hear petitioner and to evaluate his credibility. Certainly, the court had ample basis for not crediting petitioner's self-serving statement as sufficient to impugn the contemporaneous, official memorandum of the local board.

II

Petitioner also contends that he was denied due process in the procedure by which the Department of Justice arrived at its advisory recommendation and sent it to the appeal board. The essence of petitioner's complaint here is that the recommendation by the Department of Justice was based upon the memorandum of petitioner's appearance before the local board (discussed in Point 1, *supra*) without giving him additional notice and opportunity to persuade the Department before it made its recommendation to the appeal board. But the official memorandum was a part of the file which was available to petitioner and on which the Department could justifiably rely on the absence of any challenge by petitioner as to its accuracy. Moreover, petitioner had the opportunity, of which he availed himself, to challenge the accuracy of the memorandum before the body which had the duty to classify him, *i.e.,* the appeal board.

A. The procedure for classification of conscientious objectors is consistent with due process. Briefly, the registrant, claiming an exemption as a conscientious objector, may not only submit written proofs of sincerity, but has the right to make a personal appearance before the local board. If the local board disbelieves the claimant, he may appeal. Prior to the appeal board's action on the classification, it refers the case to the Department of Justice for appropriate inquiry, hearing, and recommendation. The registrant, before his appearance before the Department's hearing officer, receives a résumé of the reports of the Department's investigators, the F.B.I.

The registrant may bring an advisor to the hearing and present witnesses as well as his own testimony. The hearing officer makes a report to the Department, which is reviewed together with the whole record. A letter of recommendation is then prepared by the Department and sent to the appeal board, together with a copy of the same résumé of the F.B.I. reports which had previously been given to the registrant. The board sends a copy of this letter to the registrant, so that he may file a reply with the board. The appeal board, which is the adjudicating body, is not required to follow the recommendation of the Department of Justice.

It is evident that these selective service procedures are basically fair. As this Court noted in *United States* v. *Nugent,* 346 U.S. 1, 10, they are designed to

achieve the necessary balance between the desire to do justice in cases where the sincerity of religious conviction is in issue and the needs of mobilization and national defense which leave no time for litigious interruptions.

B. The Department of Justice was entitled to rely upon the unchallenged official record of petitioner's personal appearance before the local board. Since it was petitioner, and not the Department's hearing officer, who was present before the local board, petitioner could better have an opinion on whether the board's memorandum was correct. Moreover, petitioner had full opportunity to challenge the Department's reliance on the memorandum before the appeal board, *i.e.,* before any adjudication had been made at the appellate level.

C. Neither the statute nor due process required the Department of Justice to submit its recommendation to petitioner *before* sending it to the appeal board. The Department, under the statute, is not the adjudicating body. Its recommendation is sent to the registrant by the appeal board so that he may answer it before the body that is to adjudicate, *i.e.,* the appeal board. The registrant has opportunity there to answer the recommendation—and he did so in this case.

D. There is no basis in either the statute or the requirements of due process for petitioner's contention that the intradepartmental report of the Department's hearing officer should have been included in the file which was forwarded to the selective service appeal

board with the Department's recommendation, and which would therefore be available to petitioner. Moreover, this argument has no relation to the disputed issue in this case. Petitioner himself testified that nothing at the hearing before the hearing officer dealt with the question of whether the local board's memorandum was accurate and the Department's recommendation made clear that it was not based on the report.

1. In demanding the hearing officer's report, a registrant, in effect, is seeking to examine the processes and reasoning which go into the ultimate recommendation of the Department of Justice which, in turn, is advisory and not binding on the appeal board. But Section 6(j) of the Act provides only that the recommendation of the Department itself, not any preliminary reports within the Department, must be submitted to the appeal board. If Congress had expected the appeal board to evaluate preliminary opinions in the investigative procedure, such a requirement could easily have been stated in the statute by specifying either that the Department send such reports to the appeal board or that the board consider not merely "the record on appeal from the local board," but also the record within the Department of Justice. The statute thus contemplates that the Department submit a single, clear item of assistance for the appeal board—the fully considered, composite, and final official recommendation of the Department of Justice.

Petitioner contends that the intent of Congress that the Department of Justice forward to the appeal board the hearing officer's report is demonstrated by reenactment and amendment of the selective service laws in 1951 and 1952, at a time when the regulations so provided. However, after 1952—the year in which the regulations were amended specifically to eliminate the requirement for forwarding the hearing officer's report—the Congress again amended the Act in 1955, 1957, and 1958, without at any time indicating any exception to the new regulations. Thus, if (as petitioner contends) congressional reenactment or amendment of a statute indicates approval of regulations, the later regulations have been approved by Congress.

2. This Court held in *United States* v. *Nugent,* 346 U.S. 1, 7–10, that neither the Constitution nor the statute requires that, because Section 6(j) provides that the Department's purely advisory recommendation is to be made upon inquiry and hearing, the hearing must be a virtual equivalent of a full-scale trial. Rather, the nature of a hearing varies with the end-product for which it is provided. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 317; *Federal Communications Commission* v. *WJR,* 337 U.S. 265, 275–277. Since the Department proceeding here is not an adjudicating but an advisory one, we submit that it is not necessary that the hearing officer's report be submitted to the appeal board.

Congress was free to leave claims for exemption because of conscientious objection entirely to determination under the same procedures of selective service local and appeal boards by which claims for exemption on other grounds are decided. It was under no constitutional compulsion to provide a formal trial type of hearing, and particularly not for an inquiry or hearing by the Department of Justice or anyone else outside the Selective Service System. The fact that it did provide a special procedure to aid the selective service boards in passing on the question of religious conviction is not a basis for equating this type of hearing to administrative adjudication. The hearing officer's report is not essentially different from the memorandum of some attorney in the Department which may be accepted or overruled as the basis of an opinion by the Attorney General.

3. Since the hearing officer's report was not submitted to the appeal board, it could not constitute adverse testimony. Petitioner, like all registrants, had full opportunity to answer the only conclusions of the Department of Justice which were considered by the appeal board—the Department's final recommendation. Moreover, petitioner was fully informed of the fact that the Department's recommendation was based, not upon the hearing officer's relatively favorable report, but upon the Department's unfavorable finding of misrepresentation by petitioner to the local board. He had an opportunity before the appeal board to try to answer the basis of that unfavorable recommendation. That he did not succeed in doing so does not show a denial of due process.

III

Petitioner's request, at the district court trial, for the report of the hearing officer was also properly rejected.

A. As has been shown, the registrant is not entitled to have the hearing officer's report sent to the appeal board and thereby made available to him. For substantially similar reasons he is not entitled as of right to production of the report at the trial. The statute does not provide for production, and the report constitutes merely a preliminary recommendation within the Department of Justice.

B. Even if a registrant would be entitled to production of the hearing officer's report at trial on the basis of a showing of particular need, petitioner has completely failed to do so. Petitioner bases his claim of necessity on three allegations, all of which are completely without merit.

1. Petitioner complains that the hearing officer did not let him know that the Department "intended to rely" upon the "false" memorandum of the local board describing petitioner's appearance before it. The hearing officer, at this early hearing stage of the Departmental proceeding, could neither know nor state what the Department's ultimate position would be. Moreover, production of the hearing officer's report would have no bearing on the real issue, the accuracy of the local board's memorandum, since, admittedly, the personal appearance of petitioner before the local board was not discussed at the hearing.

2. Petitioner's two remaining alleged purposes for asking for the hearing officer's report are unspecific charges that the Department withheld "favorable evidence developed at the hearing" and that the hearing

officer denied petitioner "a full and fair hearing." Petitioner never made this claim during the administrative process although the facts were known to him. In addition, petitioner's own testimony at his trial was substantially the same as that of the hearing officer as to what occurred at the hearing. And again production of the report was immaterial since the controversy at the trial concerned the Department's recommendation which was specifically based not on the hearing officer's report but on the local board file.

Petitioner suggests, briefly and very generally, that the report was necessary in order to impeach the hearing officer's testimony. But the hearing officer was petitioner's own witness. He had not turned adverse; there was no substantial conflict between his testimony and petitioner's account of the hearing. Petitioner's reliance on *Jencks v. United States,* 353 U.S. 657, is therefore wholly inapposite.

IV

Finally, petitioner contends that he was entitled to receive the F.B.I. reports before the Department of Justice hearing or, at least, at his trial. Petitioner, however, did receive a résumé before the same résumé was considered by the appeal board, and he made no objection to its accuracy or fairness. Even now petitioner does not specify any inaccuracy or unfairness or suggest the basis for such a conjecture. Thus, he claims a general right to explore the F.B.I. reports in hope of finding something which was omitted from the résumé. But the résumé and the Department's recommendation itself show that the recommendation was not based on anything in the F.B.I. reports but rather on the local board file which was available to petitioner.

A. Petitioner's claim that he was entitled to receive the F.B.I. reports before the Departmental hearing is fully answered by the holding of this Court in *United States* v. *Nugent,* 346 U.S. 1. Nothing which has occurred since *Nugent* was decided in 1953 has weakened the force of that decision. Congress has passed several subsequent amendments to the Act without indicating any purpose to change or modify the Court's holding. Nor does *Jencks* v. *United States,* 353 U.S. 657, affect the basis of *Nugent* since *Jencks* dealt with pretrial statements by persons called as witnesses by the prosecution in a criminal trial. In contrast, at a Departmental conscientious objector hearing, no witnesses are generally called by the government. Instead, it is the registrant who, after being given a résumé of anything unfavorable in the F.B.I. reports, has the opportunity to call witnesses in his favor.

B. It follows almost inexorably from *Nugent* that F.B.I. reports need not be produced at the trial. In fact, although this issue was raised in *Nugent,* it was apparently not even considered worthy of separate discussion of the Court in affirming the conviction. Certainly, it would be strange to hold that a registrant is entitled to a résumé of F.B.I. reports (but not to the F.B.I. reports themselves) before the Department hearing, and yet to require production and disclosure of the F.B.I. reports after the résumé procedure has been followed. Thus, the courts of appeals have uniformly rejected registrants' claims to production at trial.

Admittedly, in some circumstances, there could be a real question as to the fairness of the résumé as shown by facts developed at the hearing or by reference in the Department's recommendation to unfavorable facts said to come from the F.B.I. reports which were not included in the résumé. Whether the full F.B.I. reports would be relevant in that event can be left for decision in a case where such facts are presented. Here, the fact as to petitioner's cessation of one hundred hours of preaching was stated in the résumé and is not disputed. The Department of Justice recommended against petitioner's exemption, not upon the basis of matter appearing in the F.B.I. reports, but because of the disparity between petitioner's representations to the local board—which were available to him in the selective service file—and the admitted facts. Thus, the denial of petitioner's claim to exemption rests upon evidence and admissions totally outside the F.B.I. reports. Those reports were neither necessary nor relevant at his trial.

ARGUMENT

The Department of Justice advisory recommendation to the selective service appeal board, that petitioner's claim to conscientious objection not be sustained, was based upon the fact that "the registrant's claim as to the amount of his religious activities is so highly exaggerated, if we are to believe the official records of his religious organization as reported in the résumé and recapitulated above, as to cast doubt upon his veracity and, consequently, upon his sincerity and good faith." Petitioner, in his brief, does not argue that this would not be a sufficient basis in fact to warrant denial of exemption, if the factual assumptions of that recommendation are correct. Nor does he deny that he was in fact preaching not one hundred hours a month, but instead only 6½ hours, at the time he appeared before the local board on August 17, 1956. Rather, his basic claim is that the factual assumption in the Department of Justice's recommendation is incorrect—that he did not tell the local board, at his appearance before it on August 17, 1956, that he was devoting one hundred hours a month to preaching.

Petitioner's whole substantive argument is thus based on the initial premise that the local board's memorandum of his oral appearance errs in stating that he told the board that he was preaching one hundred hours per month as of that time (August 17, 1956). Yet, although this point is basic to petitioner's entire position, it is a point he does not argue. He merely asserts flatly that the memorandum of the local board is incorrect and characterizes it as "false" throughout his brief. This he does even though the district court specifically ruled against him on this issue and the appeal board did so implicitly in classifying him I-A after his denial that he had made the claim before the local board. We first show, therefore, that there is no warrant for petitioner's repeated assertions that the summary was false. On the contrary, the trial court had ample basis for its finding that the local board's memorandum was correct.

We then consider petitioner's procedural arguments relating to his basic contention that the board's summary of his appearance was incorrect. We contend that the Department of Justice hearing was not made unfair by the Department's consideration of a document in petitioner's local board file—the summary of petitioner's statement before it on August 17, 1956—which it had, and still has, no reason to believe was untrue; and that the selective service procedures afforded petitioner ample opportunity to contest that factual issue before the appeal board, which had the power to classify him.

And, lastly, we answer petitioner's numerous procedural contentions which are largely unrelated to the real substantive issue in the case. Petitioner urges that he should have been furnished a number of items—notice by the Department of Justice hearing officer, before the Department hearing, of what the Department would ultimately recommend; the Department's recommendation to the appeal board before the recommendation was sent to the board so that petitioner might have had an opportunity to persuade the Department that its recommendation was wrong; the preliminary report made by the Department's hearing officer, before the appeal board's decision or at trial;

and the F.B.I. investigative reports (a résumé of which was furnished to the appeal board and sent to petitioner), before the Department hearing or at trial. We submit that all of these requests are unsupported by statute, regulation, judicial precedent, or the Constitution.

I

THE DISTRICT COURT'S FINDING THAT THE BOARD'S MEMORANDUM WAS A CORRECT REPORT OF PETITIONER'S PERSONAL APPEARANCE IS SUPPORTED BY THE EVIDENCE

The gist of petitioner's basic complaint is that it was error for the appeal board, district court, and court of appeals to accept, as a basis for denying his claim to sincere conscientious objection, the memorandum appearing in his local board file that, during his personal appearance on August 17, 1956, he claimed that he was preaching one hundred hours a month. Petitioner was given and availed himself of the opportunity to try to convince the appeal board that he had not made such a statement; he was given and availed himself of the opportunity to try to convince the trial court that he had made no such statement. He failed to do so. Nevertheless, petitioner bases his claim that the whole hearing procedure was unfair on his continued assertion that the memorandum was false. This portion of our brief demonstrates that there is no warrant for petitioner's factual assumption (on which his procedural arguments are based) that the local board's memorandum is inaccurate, and that the trial court properly ruled against petitioner on this factual issue.

A. THE ACCURACY OF MUCH OF THE MEMORANDUM IS CONCEDED AND THERE IS NO REASON TO DOUBT THE REMAINING PART

The board memorandum related to the personal appearance of petitioner before the board on August 17, 1956, pursuant to his request (R. 136, 172). The memorandum recited that petitioner claimed IV-D classification as a minister, and that he also claimed that this automatically qualified him as a conscientious objector. The memorandum further recited that the board advised petitioner that this latter statement was in error (R. 173). Petitioner, in his testimony in court, admitted the correctness of the memorandum in these respects (R. 95, 109). The memorandum next said that petitioner stated that he had always made the claim that he was a minister, and that he would definitely not participate in the conscientious objector work program (R. 173). At the trial, petitioner denied having made these statements (R. 95-96), but in his brief in this Court he states that these paragraphs of the memorandum are "substantially true about what happened at the board" (Pet. Br. 6).

What petitioner primarily challenged before the appeal board and the district court was the statement in the local board's memorandum, quoting petitioner as claiming, *inter alia,* that he was devoting one hundred hours to public preaching per month. Since petitioner himself admits, however, that most of the memorandum accurately reports his appearance before the board, there is no reason to believe that the memorandum was not also accurate in this respect, at least in the absence of some contrary indication. While the quotation in the memorandum is in the exact language of petitioner's letter to the board of November 22, 1952 (see *supra*, p. 11), there is nothing in the record to support petitioner's claim (Pet. Br. 6) that the memorandum merely copied the earlier letter. On the contrary, the memorandum reads, "Mr. Gonzales stated," thereby indicating, as a reasonable inference, that petitioner either read the earlier letter or a copy himself,[11] that the letter was read to petitioner and reaffirmed by him, or that the letter was substantially the same as petitioner's extemporaneous remarks.

Petitioner testified at the trial, and assumes here (Pet. Br. 6), that since his entire personal appearance before the board took only four or five minutes, all the events described in the memorandum could not have occurred. But, aside from the considerable question as to whether, on petitioner's own version of what occurred, the five-minute figure can be taken as wholly accurate,"[12] only fifteen lines of the memorandum are now challenged (R. 95–96, 173). Little time would have been required to read these few lines.

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[11] It is probable that petitioner retained a copy of his original letter, since the total absence of error or change in the handwritten letter in the board file (R. 146–147) indicates that it may have been copied from a draft. See also petitioner's admission at the trial that he was prepared for his appearance before the board with at least some written material—"a schedule I had made out" (R. 99).

B. THE LOCAL BOARD WAS AUTHORIZED BY LAW TO MAKE A SUMMARY OF PETITIONER'S PERSONAL APPEARANCE BEFORE IT

The presumption that the memorandum is an accurate one is supported by the fact that the local board was authorized to make such a record. Contrary to petitioner's assertion (Pet. Br. 29) that the "board acted highly irregularly in making the memorandum," the regulations state: "Since it is imperative that appeal agencies have available to them all information on which the local board determined the registrant's classification, oral information shall not be considered unless it is summarized in writing and the summary placed in the registrant's file." 32 C.F.R. (1954 rev.) 1623.1(b), *supra*, p. 5. For this reason, a summary was made of petitioner's appearance, which was filed on August 17, 1956, the same day as his appearance.

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[12] Petitioner asserted at the trial that he had been away from a parking meter for five minutes. According to petitioner's own account and later admissions on cross-examination, he left the parking meter, "went upstairs" to the local board office, was told by the clerk to wait, was told "very shortly" that the board would see him, then went into the board room, "was introduced to the members," was asked if he had any "new evidence," and presented his marriage certificate (R. 96–97). He then opened his Bible, stated that he wanted to discuss his ministerial duties, and received the reply of the board asserting familiarity with this evidence (R. 86, 97). Petitioner was, in addition, asked by the board whether he thought he was entitled to any other classification than that of I–A; he replied that he was a minister and as such should be classified IV–D, and that a minister was automatically classified as a conscientious objector (R. 95). The board replied that the latter statement was in error (R. 95). When petitioner started to leave, the clerk asked whether petitioner desired his papers forwarded to the appeal board, and he replied in the affirmative (R. 97). Petitioner then had to return downstairs to reach the parking meter, all within the claimed five minutes.

Nor was the memorandum "made behind petitioner's back" (Pet. Br. 29). He was promptly notified of the board's decision (R. 136). He cannot expect, nor does the law require, that with this notice there must be sent to him a copy of his whole board file, upon which the decision was based. Petitioner admitted that he was aware of his right to examine the board's file and ascertain the basis of the board's adverse conclusion (R. 109).

Petitioner attempts (Pet. Br. 29) to read significance—indeed, a presumption—into the fact that the government did not call the members of the board or the clerk to testify at petitioner's trial. But it was petitioner, and not the government, who was challenging the official record. There was no reason for the government to seek to establish by additional evidence the accuracy of an official contemporaneous record to which the presumption of regularity necessarily attaches. Moreover, in the absence of any particularly striking incident, these persons could not be expected, two years after the fact, to have an independent recollection of one of the numerous cases with which they dealt. Petitioner thus has no basis for asserting—without citation of supporting authority—that there is a "conclusive presumption" that the board members and clerk would have "corroborated" his testimony (Pet. Br. 29).

C. PETITIONER'S CONDUCT SUPPORTS THE PROBABILITY THAT HE CLAIMED ONE HUNDRED HOURS OF PUBLIC PREACHING

Petitioner's conduct tends to support the board's memorandum that he claimed one hundred hours of public preaching a month when he appeared before it on August 17, 1956. During the entire three-year period that intervened between the cessation of petitioner's status as a Pioneer and the reduction in his public preaching from one hundred to 6½ hours per month in April 1953, and his appearance before the local board in August 1956, petitioner at no time obeyed the requirement—which appeared prominently in the questionnaire which he filled out (*supra*, p. 10)[13]—that he inform the board of any new fact which "may affect" his classification.[14] Thus, when the local board mailed a form on May 2, 1956, inquiring as to his present status, petitioner merely replied that he was self-employed at masonry work in Colorado Springs and was an active member of the Jehovah's Witnesses; he made no mention of the fact that he was no longer a Pioneer and was devoting far less time to public preaching.

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[13] The requirement appeared on the first page of the questionnaire and is made mandatory in the regulations, 32 C.F.R. (1954 rev.) 1625.1(b), *supra*, p. 5.

[14] Petitioner's brief suggests (Pet. Br. 6), without expressly so stating, that petitioner assumed the board knew that he had ceased to be a Pioneer. He first cites (as "F. 23A") the résumé of the F.B.I. report on his prior appeal (R. 165) which included this fact. Petitioner testified, however, that he had not received the earlier résumé (R. 105). Petitioner then cites a letter (R. 166–167) from himself to the board (with the implication that he thereby notified the board of his reduced hours of preaching). But that letter (cited by petitioner as "F. 25") clearly provided no such notice. To the contrary, it seems designed to lead the board to assume that petitioner's activities were still on the last reported basis of one hundred hours of public preaching per month—for example, it states, "As you already know I am an active member of 'Jehovah's Witnesses'." Petitioner's next citation is to a letter (R. 93–94) that was not even in existence until seven months subsequent to petitioner's appearance before the board. Petitioner's remaining citation is to petitioner's testimony two years later in

Moreover, petitioner did not tell the board of the important changes in his status when he appeared before it on August 17, 1956. It is undisputed that petitioner expressly claimed ministerial classification before the board, despite the equally undisputed fact (of record in his own religious sect's records) that he was then preaching only 6½ hours per month and was no longer a Pioneer minister of his sect.[15] And even when he was expressly asked during his appearance before the board whether he had any new matter to present, he informed the board only of the fact of his marriage (R. 173).

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court (R. 99), as to what he would have told the board if he had been allowed to. (Actually, the board only denied petitioner time for further Bible reading, since that evidence had already been supplied to it (R. 86, 97)). There is thus no warrant for the suggestion that petitioner thought that the draft board knew of his reduced preaching activities.

[15] At page 6 of petitioner's brief a sentence dealing with petitioner's appearance before the board is immediately followed in the same paragraph by the assertion, "Petitioner testified that he was then only a part-time minister devoting only about 20-25 hours a week to study and * * * averaged only 6½ hours a month to his missionary work and that long before he had quit the full-time ministry (R. 104-105)." Petitioner so testified, not before the board on August 17, 1956, but two years later at his trial in the district court.

Petitioner's nondisclosure cannot be dismissed as mere inadvertence, since, in originally presenting his claim to a ministerial exemption, he had not only written a letter setting forth the one hundred hours devoted to preaching, but had filed the certificate of his appointment as a Pioneer (R. 140). He could not have been unaware that, whatever his own or the Witnesses' broad view of what a ministerial status might be, his claim before the Selective Service System for ministerial status continued to depend upon the same representation of one hundred hours of public preaching that he had made before. Moreover, he was not oblivious to the need for full disclosure when it would serve his own purposes, for he brought his marriage certificate when he appeared before the local board.

In summary, as the court of appeals held (R. 189-190, 193), the evidence before the district court fully supported the description of petitioner's appearance before the local board contained in the board's memorandum, including the statement that petitioner had reiterated his claim to one hundred hours of public preaching per month. The correctness of this description is supported by the fact that it was an official document authorized by law, was filed promptly after petitioner's appearance, and was admittedly accurate in other respects. Moreover, the evidence showed that petitioner had failed to disclose that he was no longer a Pioneer and was devoting only 6½ hours per month to public preaching from the time his status changed in April 1953 until he appeared before the board in 1956—and he failed to make these disclosures when expressly asked by the board if he had any new matter to present. As against this evidence, petitioner submitted only his own statement to the appeal board (*supra*, p. 15), and his testimony at trial, that, although he had admittedly claimed before the local board to be a minister, he had not made the supporting claim of one hundred hours preaching a month. In view of all the circumstances—including the opportunity of the trial court to see and hear petitioner and to evaluate his credibility—the district court had more than a reasonable basis for not crediting petitioner's self-serving statement as sufficient to impugn the contemporaneous, official memorandum of the local board.

II

THE SELECTIVE SERVICE PROCEDURES FOLLOWED IN THIS CASE WERE CONSISTENT WITH DUE PROCESS AND THE STATUTE

The memorandum of petitioner's personal appearance before the local board was included in the file which was sent to the Department of Justice before the Department made its recommendation. Despite the fact that petitioner knew that the file was available to him he did not challenge the accuracy of the memorandum before or at the time that his case was before the Department. Instead, his first objection to the accuracy of the file was in his reply to the Department's recommendation which referred to the memorandum of his personal appearance before the local board. Disregarding his own neglect in this respect, he now attacks the whole hearing procedure as unfair because reference was made to this official record in the Department's recommendation. We now show that the Department of Justice was entitled to rely upon the unchallenged official record, that petitioner was given sufficient notice of the Department's reliance on that record, and that he had and availed himself of the opportunity to attempt to challenge the record before the body which had the duty to classify him, *i.e.,* the appeal board. Therefore, petitioner was accorded what due process the statute and the regulations required.

A. THE GENERAL PROCEDURE FOR CLASSIFICATION OF CONSCIENTIOUS OBJECTORS IS CONSISTENT WITH DUE PROCESS

Before discussing the particular points which petitioner raises, we review briefly, as general background, the procedure by which a person claiming conscientious objection is classified. In general, the procedure is similar to that set forth in this Court's opinion in *United States* v. *Nugent,* 346 U.S. 1, but various changes have subsequently been made, some as the result of decisions by this Court, and therefore it seems desirable to summarize them here.

A person claiming exemption from combatant or non-combatant service fills out the special form for conscientious objectors. The registrant has the opportunity to supplement his written proofs of sincerity with a personal appearance before the local board, so that the board may talk to him in judging his sincerity. If the local board is not convinced of the registrant's sincerity, he may appeal. Before the appeal board acts on the classification, it refers the case to the Department of Justice for "appropriate inquiry", hearing, and recommendation pursuant to Section 6(j) of the Act (*supra*, pp. 2–4). The entire local board file is transmitted to the Department. The registrant, prior to his appearance before the Department's hearing officer, receives a résumé of the reports of the Department's investigators, the F.B.I.

A hearing is then held before a hearing officer who is a private attorney volunteering his services without pay. The registrant may bring an advisor to the hearing and may present witnesses as well as his own testimony. The hearing officer makes a report to the Department, which is reviewed, together with the whole record, by the unit within the Department (the Conscientious Objector Section of the Office of Legal Counsel) charged with the administration of the duties imposed by Section 6(j). A letter of recommendation is then prepared by the Department and sent to the appeal board, together with a copy of the résumé of the F.B.I. reports which had previously been given to the registrant. The board sends a copy of the letter of recommendation to the registrant, so that he may file a reply with the board. The local board file is also returned to the appeal board.

In the Selective Service System, the ultimate responsibility for classification of registrants has been placed by Congress on the appeal boards. As the Court pointed out in *United States* v. *Nugent*, 346 U.S. 1, 9, "it has long been recognized that neither the

Department's 'appropriate investigation' nor its 'hearing' is the determinative investigation and the determinative hearing in each case." Thus, Section 6(j) explicitly provides that the appeal board is not required to follow the recommendation of the Department of Justice. Rather, the appeal board acts, according to the regulations, on the basis of all the information that is before it in the file—that is, the entire selective service file (including materials offered by the registrant and the summary of his personal appearance), the written letter of recommendation by the Department of Justice with the résumé of the F.B.I. reports, and the written reply of the registrant to the Department's recommendation. 32 C.F.R. (1958 Supp.) 1626.24(b), *supra*, p. 6.[16]

It is evident that the procedures now, perhaps even more than at the time of the *Nugent* decision,[17] are basically fair. They are designed to achieve the necessary balance, which this Court noted in *Nugent*, *supra*, 346 U.S. at 10, between the desire to do justice in cases where the sincerity of religious conviction is in issue and the needs of mobilization and national defense which leave no time for litigious interruptions.

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[16] The only other information which may be considered is "[g]eneral information concerning economic, industrial, and social conditions." 32 C.F.R. (1958 Supp.) 1626.24(b). This regulation, adopted in Executive Order 10659, 21 Fed. Reg. 1079, Feb. 17, 1956, was in effect at the time the Department of Justice made its recommendation and the appeal board made its determination on March 21, 1957, and May 2, 1957, respectively, and still is in effect.

[17] For example, as a result of *Gonzales* v. *United States*, 348 U.S. 407, the appeal board is allowed to consider a reply by the registrant to the Department of Justice's recommendation. 32 C.F.R. (1958 Supp.) 1626.24(b).

B. THE DEPARTMENT OF JUSTICE HAD THE RIGHT TO RELY UPON THE UNCHALLENGED OFFICIAL RECORD OF PETITIONER'S PERSONAL APPEARANCE

The memorandum of petitioner's personal appearance before the local board was included in the local board file sent to the appeal board when petitioner took his appeal and by the appeal board to the Department of Justice. Since petitioner took the appeal without challenging the record, he can hardly complain of the action of the Department in taking the record as it found it. It was certainly not the duty of the hearing officer to advise petitioner of what was in the local board file, which—as petitioner knew (R. 109)—was available to him. Since it was petitioner, and not the Department's hearing officer, who was present before the local board on August 17, 1956, petitioner could better have an opinion as to whether the board's memorandum was correct. Petitioner could discover such error, if it truly was an error, and it was petitioner's duty to examine the file and seek to have it corrected for the purpose of his appeal.

There is no warrant for the conjecture, which petitioner now states as a fact (Pet. Br. 27, 36, note 16), that the Department of Justice, at the time of petitioner's appearance before its hearing officer, "then intended" to rely on petitioner's misrepresentation of his hours of preaching. The date of the hearing was

January 7, 1957, and the date of the Department's letter charging the misrepresentation by petitioner was over two months later, *i.e.,* March 21, 1957. The letter shows on its face that it could not have been drafted until after the hearing officer had already presented his report, since the letter summarizes, *inter alia,* the hearing officer's recommendation. What is evident from the recommendation is that in reviewing the entire case, including the hearing officer's report, the significant discrepancy between petitioner's actions and his claims was noted by the Conscientious Objector Section of the Department which is charged with the responsibility of reviewing these matters. In accordance with the duty imposed upon it to make a recommendation to the appeal board, it noted this discrepancy which appeared of record in the file. The Department had no way of knowing that the local board memorandum, which was an official part of the record in the file, was later going to be challenged.

C. NEITHER THE STATUTE NOR DUE PROCESS REQUIRED THE DEPARTMENT OF JUSTICE TO SUBMIT ITS RECOMMENDATION TO PETITIONER BEFORE FURNISHING IT TO THE APPEAL BOARD

Neither the statute nor due process supports petitioner's contention (Pet. Br. 29) that he was entitled to notice of what the Department of Justice proposed to recommend to the appeal board, before the recommendation was sent to the appeal board. As shown above (pp. 43-44), the Department, under Section 6(j) of the Act, is not the adjudicating body. Its recommendation is sent to the registrant so that he may file an answer, as petitioner did, before the body that does adjudicate, *i.e.*, the appeal board.

Petitioner, in the Statement portion of his brief, says—without record citation—that the appeal board "received and considered" the Department's recommendation before it was forwarded to petitioner "months after his hearing in Pueblo, Colorado" (Pet. Br. 10). While it is true that the recommendation was not sent to petitioner until months after the hearing was held on January 7, 1957, the Department's recommendation was not made until March 21, 1957 (R. 174). Petitioner himself acknowledged that he received the recommendation in a letter sent by the appeal board from Denver on April 4 (R. 182). Petitioner then took until April 23 to send his reply to the appeal board (R. 182).[18] Since the appeal board's decision was not handed down until May 2, 1957 (R. 136; Ex. 1, F. 42A), there was ample time before May 2 for petitioner's answer to be given full consideration. Nothing in the record even suggests that the appeal board nevertheless violated its duty under the statute and regulations.

Petitioner had full opportunity, of which he availed himself, to reply to the Department's recommendation to the appeal board, which is the deciding tribunal. The statute, and certainly due process, do not require the interjection of another intervening step by having the registrant see the Department's recommendation before it is sent to the appeal board so that he can discuss with the Department the advisory recommendation it should make.

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[18] The reply involved only (1) a brief assertion that petitioner was opposed to non-combatant as well as combatant service, (2) an assertion that he did not tell the local board that he was preaching one hundred hours a month, and had made that representation only in 1952 and 1953 when he was preaching to that extent, (3) an assertion that he was not a Stock Servant when he appeared before the local board, and (4) an assertion that his religion would prevent him from lying (R. 182).

D. NEITHER THE STATUTE NOR DUE PROCESS REQUIRED THAT THE REPORT MADE TO THE DEPARTMENT OF JUSTICE BY ITS HEARING OFFICER BE SENT TO THE APPEAL BOARD WITH THE DEPARTMENT'S RECOMMENDATION

Petitioner argues (Pet. Br. 30–35) that the hearing officer's report to the Department, as well as the Department's ultimate recommendation, should have been sent to the appeal board with the remainder of the file. This argument has no relation to the disputed issue in this case, since petitioner did not challenge the accuracy of the local board's memorandum of August 17, 1956, until his reply to the Department's recommendation, and since he himself testified that nothing at the hearing dealt with the question of whether the local board's memorandum was accurate (R. 110). Moreover, the Department's recommendation itself makes clear that it was not based on the report (R. 176). Nevertheless, petitioner claims as a matter of right that the appeal board should have been furnished the hearing officer's report.

1. In demanding that the hearing officer's report be sent to the appeal board, petitioner is, in effect, seeking to have the appeal board examine—and to allow the registrant to examine (since the file is avail-

able to him)—the inner processes and reasoning which went into the Department's ultimate recommendation, which in itself is not binding on the appeal board. But the investigative processes and preliminary recommendations of the Department's voluntary hearing examiners are not properly a matter for the appeal boards or registrants. Thus, Section 6(j) of the Act provides only that the recommendation of the Department itself, not any preliminary reports within the Department, must be submitted to the appeal board. If Congress had expected the appeal board to evaluate preliminary opinions in the investigative procedure, such a requirement could easily have been stated in the statute by specifying either that the Department send such reports to the appeal board or that the appeal board consider not merely "the record on appeal from the local board" (Section 6(j), *supra,* p. 4), but also the record within the Department of Justice. Similarly, Section 3 of the Administrative Procedure Act (5 U.S.C. 1002), upon which petitioner erroneously relies (Pet. Br. 50, 52), provides only that "final opinions or orders in the adjudication of cases" and "matters of official record" must be disclosed. It is therefore clear that neither of these statutes requires the disclosure and consideration of a preliminary report which is part of an investigative procedure. Rather, Section 6(j) of the Training and Service Act contemplates that the Department submit, as a single clear item of assistance for the appeal board, the fully considered, composite, and final recommendation of the Department of Justice.

Petitioner contends (Pet. Br. 31) that the intent of Congress that the Department of Justice forward to the appeal board the hearing officer's report is demonstrated by reenactment and amendment of the selective service laws in 1951 and 1952, at a time when the regulations so provided. Petitioner adduces no legislative history in support of his contention, and ends his history of the statute in 1951. However, after 1952—the year in which the regulations were specifically amended to eliminate the requirement that the hearing officer's report be forwarded (17 Fed. Reg. 5451)—Congress again amended the Act, in 1955, 1957, and 1958, without at any time indicating any exception to the new regulations as being contrary to the legislative intent or to the statutory language. Act of June 30, 1955, 69 Stat. 223; Act of August 9, 1955, 69 Stat. 598, 602; Act of June 27, 1957, 71 Stat. 206; Act of August 21, 1958, 72 Stat. 711. Thus, if as petitioner contends, congressional reenactment or amendment of a statute indicates approval of regulations, the later regulations have been approved by Congress. But more important, as we have shown above (p. 49), the statute itself does not require that the hearing officer's report be sent to the appeal board. The earlier requirement in the regulations for forwarding of the report was, therefore, merely a procedure which was administratively implemented and which could be changed under the statute when found to have unfavorable aspects.[10]

2. This Court held in *United States* v. *Nugent,* 346 U.S. 1, 7–10, that neither the Constitution nor the statute requires that, because Section 6(j) provides that the Department's purely advisory recommendation is to be made upon inquiry and hearing, the hearing must be a virtual equivalent of a full-scale trial. For the nature of a hearing varies with the end-product for which it is provided. Or, as Mr. Justice Cardozo stated in *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 317, "The answer [to the meaning of "hearing"] will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen." Similarly, the Court has upheld "the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind" and stated that the problem is "one for case-to-case

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[10] The forwarding of the reports was found to impose on the appeal board preliminary conclusions and sometimes confidential, irrelevant, or inaccurate language of the many scattered hearing officers. Instead, the appeal board and the registrant were entitled to the completed, official recommendation of the Department of Justice, consolidating and evaluating all the various elements of decision, without a confusing array of preliminary reasoning. There was also some undesirable experience with registrants directing complaints, and even pressures, against the local hearing officers by reason of details contained in their reports. Since the hearing officers are attorneys volunteering their service without pay, anything tending to add to the onerousness of their services tends to interfere with the availability of competent, responsible volunteers.

determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them." *Federal Communications Commission* v. *WJR,* 337 U.S. 265, 276–277. Considering the question in this light, we submit that it is not necessary under the Constitution or the statute to submit the report of the hearing officer to the appeal board.

The procedure within the Department of Justice, and even the ultimate adjudication, deals not with an absolute right, but with qualification for the privilege of exemption from the universal liability for service in the nation's armed forces. See *United States* v. *Macintosh,* 283 U.S. 605, 615; *Knauff* v. *Shaughnessy,* 338 U.S. 537, 542. Congress was free to leave claims for exemption because of conscientious objection entirely to determination by selective service local and appeal boards, as it has in fact done with regard to claims for exemption on all other grounds. It was under no constitutional compulsion to provide a formal trial type of hearing, and particularly not for an inquiry or hearing by the Department of Justice or any other agency outside the Selective Service System. The fact that it did provide a special procedure to aid the selective service boards in passing on questions of religious conviction is not a reason for equating this type of hearing to administrative adjudication. The Department does not decide; it advises. The Department's voluntary hearing officers for this proceeding are not in the same category as the trained, specially qualified and specially protected hearing examiners acting in adjudications under the Administrative Procedure Act. The hearing officer's report here is not essentially different from the memorandum of an attorney in the Department which may be accepted or overruled as the basis of an opinion by the Attorney General. The intradepartmental memoranda or reports of the Department's attorneys, or the hearing officers it uses for this purpose, are not properly the subject of publication. The significant fact to the appeal board is what the Department recommends, and its reasons. A copy of that recommendation goes to the registrant and that is all to which he is entitled.

In *United States* v. *Nugent, supra,* this Court held that, since neither Section 6(j) of the Act nor the Constitution requires that the Department of Justice provide the equivalent of a trial, the registrant need not be furnished F.B.I. reports at the Department hearing. It follows from that decision that the registrant need not be furnished with the hearing officer's report based on the F.B.I. reports (to which the registrant is not entitled under *Nugent*), on the local board's file (which is available to the registrant), and on the hearing (which the registrant attends and therefore has complete knowledge of). The only additional element of the hearing officer's report, his own conclusions, are given to the registrant—and were given to petitioner here (R. 176)—in the Department's recommendation to the appeal board.

In fact, we submit that even the dissenting opinions in *Nugent* are not inconsistent with our position on this issue. Both these opinions emphasize (346 U.S. at 10–14) that the entire F.B.I. reports should be disclosed in order to allow the registrant to meet adverse testimony. But since the hearing officer's report is not even submitted to the appeal board, it cannot possibly constitute adverse evidence. Petitioner, like all registrants, had full opportunity to answer the only adverse conclusions of the Department of Justice which were considered by the appeal board, that is, its final recommendation. Thus, the withholding of the hearing officer's report did not deprive petitioner of a full and fair hearing before the appeal board, the body which actually adjudicated his status.

Consistent with our view, the Court held in *Gonzales* v. *United States,* 348 U.S. 407, 415, that "the right [of the registrant] to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts *in the file* and made with awareness of the recommendations and arguments *to be countered"* (emphasis added). Therefore, the Court concluded that the Act required that the registrant should receive a copy of the recommendation of the Department of Justice so that he could answer it before the appeal board performed its duty of acting on his classification. But the Court did not say that the registrant had the right to go behind the Department's recommendation.[20]

3. In this case, petitioner, having attended the Department hearing, was in a position to bring to the attention of the appeal board any element of the hearing which he believed was improperly omitted or described in the Department's recommendation. Moreover, he was fully informed by the Department's recommendation that it was based, not upon the hearing officer's relatively favorable report,[21] but upon the Department's unfavorable finding of misrepresentation by petitioner to the local board. He had an opportunity, before the appeal board, to try to answer the basis of the unfavorable recommendation. That he did not succeed in doing so does not show a denial of due process.

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[20] The only lower court which has apparently considered this issue expressly held that neither the statute nor due process requires that the hearing officer's report be submitted to the appeal board or the registrant. *United States* v. *Jones*, 142 F. Supp. 806, 820-821 (E.D. S.C.), affirmed, 241 F. 2d 704 (C.A. 4). Moreover, *Bouziden* v. *United States*, 251 F. 2d 728 (C.A. 10), certiorari denied, 356 U.S. 927 (discussed *infra*, p. 57), held that registrants are not entitled to disclosure of the hearing officer's report at trial.

Petitioner cites *Mazza* v. *Cavicchia*, 15 N.J. 498 (Pet. Br. 33), but in that case the hearing officer's report was a part of the procedure before the *adjudicating* body. Here, as we have shown above, the hearing officer's report constituted merely a preliminary step within a *recommending* body (the Department of Justice), not a part of the procedure of the adjudicating body (the appeal board).

[21] The conclusions of the hearing officer were disclosed to petitioner and the appeal board by the Department's recommendation (R. 176).

III

PETITIONER'S REQUEST, AT THE DISTRICT COURT TRIAL, FOR THE REPORT OF THE HEARING OFFICER WAS PROPERLY REJECTED

In addition to urging that the hearing officer's report should have been sent to the appeal board with the recommendation by the Department of Justice, petitioner contends (Pet. Br. 36–40) that the district court deprived him of a fair trial by refusing to require production of the report in that tribunal. In particular, he asserts (Pet. Br. 36, note 16) that the failure of the district court to require production deprived him of the opportunity to challenge three alleged inadequacies in the Department of Justice's procedure.

A. A REGISTRANT IS NOT ENTITLED AS OF RIGHT TO HAVE THE HEARING OFFICER'S REPORT PRODUCED AT HIS TRIAL

Insofar as petitioner's contention is that a registrant is entitled in every case to disclosure of the hearing officer's report at trial, we submit that his claims are erroneous for substantially the same reasons as those with regard to inclusion of the report in the file before the appeal board, which is available to the registrant (see *supra*, pp. 48–55). As we have emphasized, the statute does not require production at any time. The hearing officer's report is merely a recommendation within the Department of Justice. As such it is nothing more than a preliminary, though important, work-paper, substantially similar to other memoranda within the Department which no one would suggest are public documents. The only recommendation seen and considered by the appeal board was the recommendation of the Department, which the appeal board could accept or reject. Since petitioner had available the full record before the body making the adjudication, the appeal board, he had the full opportunity, consistent with the statute and due process, to challenge at his trial the basis on which the adjudication was made.

This contention is supported by the only lower court decisions which have considered this issue. In *Bouziden* v. *United States*, 251 F. 2d 728 (C.A. 10), certiorari denied, 356 U.S. 927, the registrant challenged the trial judge's exclusion from evidence of the hearing officer's report. The court of appeals rejected this contention.[22] Similarly, Judge Kaufman rejected a registrant's motion for production of the hearing officer's report in a case in the Southern District of New York. *United States v. Erikson*, C. 151-333, S.D.N.Y., order of February 18, 1957.[23]

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[22] The court of appeals actually discussed in its opinion only the registrant's request for the production of the hearing officer's notes. It is clear, however, that the issue of the hearing officer's report was raised in the district court and court of appeals, and the latter court affirmed the conviction. See Pet. 3, 25-28, and R. 3(IX) in No. 804, October Term, 1957, of this Court.

[23] In addition, the registrant was denied disclosure of the hearing officer's report in *United States* v. *Stasevic*, 117 F. Supp. 371, 375 (S.D.N.Y.), reversed on other grounds *sub nom. United States* v. *Vincelli*, 215 F. 2d 210 (C.A. 2). There, however, the report was requested only to show that a stenographic record of the Department of Justice hearing was made. And the district court merely held that there was no

B. PETITIONER'S COMPLAINTS CONCERNING ADJUDICATION OF HIS OWN PARTICULAR CASE SHOW NO SPECIAL NEED JUSTIFYING DISCLOSURE OF THE HEARING OFFICER'S REPORT

For the reasons stated above—that the hearing officer's report constitutes an internal and preliminary memorandum within the Department of Justice—we do not believe that a registrant is entitled under the statute or due process to a court order compelling production of the hearing officer's report. At least, however, we submit that production may not be ordered unless the registrant demonstrates clearly and with particularity that disclosure is vitally necessary for the protection of his rights. Here, petitioner bases his claim of necessity for disclosure of the report upon three allegations against the Department of Justice's procedures (Pet. Br. 36, note 16), all of which are completely without merit.

1. Petitioner complains that the hearing officer did not let him know that the Department "intended to rely" upon the the "false" memorandum of the local board reciting petitioner's representations to it on

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need for disclosure of the report because the stenographic record was not subject to production.

Petitioner cites (Pet. Br. 38, note 19) several district court cases which he states permitted registrants to obtain the report of the hearing officer. In fact, however, each of these cases required only production of the transcript of the Department hearing. Since the registrant is himself present at this public hearing, production of the transcript obviously does not involve disclosure of the internal processes of the Department. In contrast, production of the hearing officer's report means disclosure of an intradepartmental memorandum containing the reasoning of an officer making a preliminary recommendation.

August 17, 1956. As we have pointed out above (pp. 45-46), the hearing officer at the early hearing stage of the Departmental proceeding could neither know nor state what the Department's ultimate position would be. Moreover, it was primarily petitioner's duty and not the Department's to see that his file accurately reflected his statement before the local board. In any event, production of the hearing officer's report could have no possible bearing on this issue since, as petitioner admits (R. 110), the personal appearance of petitioner before the local board was not even discussed at the hearing.

2. Petitioner's two remaining purposes for asking for the hearing officer's report are unspecific charges that the Department withheld "favorable evidence developed at the hearing" from the appeal board and that the hearing officer denied petitioner "a full and fair hearing." Petitioner never made these claims during the administrative process although the facts were as well known to him then as now. He had himself attended the hearing and received the Department's recommendation. Thus, he knew what evidence was "developed at the hearing," and what evidence "developed at the hearing" was "withheld" in the Department's recommendation to the appeal board. Similarly, he knew the procedures that had been accorded to him at the Departmental hearing.

At the district court trial, petitioner testified in full concerning the details of the hearing (R. 86-91, 93, 101-105, 109-110). He disclosed nothing to support the present accusations. He called the hearing officer as his own witness (R. 44), and elicited nothing substantially contrary to or additional to petitioner's own recollection (see R. 116). The request for the hearing officer's report within the Department, accordingly was not supported by any showing that it would have any bearing on the contested issues in the case. In fact, no such showing was even possible. The Department's recommendation had informed the appeal board that the hearing officer had recommended exemption for petitioner from combatant training and service. The controversy at the trial concerned the Department's unfavorable recommendation, which was based, not on the hearing, but on the local board file. The hearing officer's interim recommendation could have no bearing on that issue.[24]

Petitioner suggests, briefly and very generally, that the report was necessary in order to impeach the hearing officer's testimony. But the hearing officer was petitioner's own witness. He had not turned adverse; as the district court found, "there was no substantial difference in the fact[s] as related by Mr. Evenson and those related by [petitioner]" (R. 116). In such circumstances, petitioner's reliance (Pet. Br. 39) on *Jencks* v. *United States*, 353 U.S. 657 (which we also discuss, *infra*, p. 65), is clearly inapposite.

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[24] Petitioner assumes that the "facts were more extensively stated by the hearing officer in his formal report" (Pet. Br. 38). Even if true, this would only be further, repetitious cumulation of facts which petitioner described in detail at the trial without contradiction, and which are irrelevant to the only real issue in the case—the accuracy of the local board's memorandum. It is interesting to note, however, that petitioner here indicates the superiority of the report as evidence because the report was made "soon after the hearing." He accords no such superiority when he deals with the central issue as to whether his self-serving denial of misrepresentation before the local board should override the board's memorandum, which was also made "soon after" the event (see *supra*, p. 37).

IV

PETITIONER WAS NOT ENTITLED TO THE F.B.I. REPORTS BEFORE THE DEPARTMENT OF JUSTICE HEARING OR AT HIS TRIAL

Petitioner contends (Pet. Br. 62–78) that he was entitled to receive the F.B.I. reports before the Department of Justice hearing. He further claims (Pet. Br. 40–62) that the district court erred in refusing to order production of the reports so that he would be able to prove at his trial that the Department of Justice had withheld favorable evidence from the appeal board and summarized unfavorable evidence out of context to mislead the board.

Petitioner received a résumé of the reports more than two months prior to the furnishing of the résumé to the appeal board, and he made no objection to its accuracy or fairness (*supra*, p. 16). The résumé consisted of a summary of statements of friends and associates favorable to petitioner, a summary of the records of petitioner's own religious sect as to the time devoted by petitioner to religious activity, and a summary of an incident in which petitioner was picked up by the police but not booked (R. 178–180).

The recommendation of the Department of Justice was based upon what petitioner had represented to the local board on August 17, 1956—a matter attested, not in the résumé, but in the records of the local board. In the Department's recommendation, this was compared with the undisputed facts concerning the small amount of time petitioner was then actually devoting to public preaching. This issue in no sense turned upon the résumé of the F.B.I. reports.[25]

Since the Department's recommendation was not based on the F.B.I. reports and since the reports were not furnished to the appeal board—that board having before it only the same résumé that was furnished to petitioner—petitioner cannot properly claim that he was prejudiced by any unfavorable material in the reports which he was not given the opportunity to rebut. Similarly, his general conjecture—that there might have been something favorable to him in the F.B.I. reports which was omitted from the résumé—is also without substance. The primary duty of producing proof of sincerity in conscientious-objector cases must lie with the person who claims the exemption and who is obviously most familiar with the basis of the claim. Yet petitioner did not specify at the trial, and does not now specify, any inaccuracy or unfairness in the résumé nor any basis for even a conjecture that there actually was any inaccuracy, omission, or unfairness. Thus, petitioner is in effect claiming a general right to explore through the F.B.I. reports in the hope of finding some item which in his own judgment should have been included in the résumé or perhaps summarized in different language. In fact, on petitioner's logic, not only the reports themselves, but also the persons interviewed, would have to be produced before the trial court since it is at least possible that they said something favorable to petitioner which was not included in the reports.

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[25] The Department of Justice recommendation (R. 174-177) clearly placed no reliance on the incident with the police. Not only did the résumé exonerate petitioner (R. 179-180), but the Department recommendation states that the hearing officer accepted the résumé's conclusion that the charges against petitioner were false (R. 176). Similarly, petitioner's own testimony at the trial, in which he stated the full exonerating details, was at no point challenged by the government (R. 89-91). Moreover, petitioner testified that the hearing officer had assured him that since there had been no arrest or filing of charges, he believed the incident to "have no bearing against [petitioner]" (R. 91). The opinion of the trial judge likewise placed no reliance on the incident (R. 114-118).

A. BEFORE HEARING

The question of a registrant's right to the full F.B.I. reports, rather than a résumé, before the Department of Justice hearing, was fully considered by this Court in *United States* v. *Nugent,* 346 U.S. 1. There, the Court held (*id.* at 5–6, 9):

> We think that the statutory scheme for review, within the selective service system, of exemptions claimed by conscientious objectors entitles them to no guarantee that the F.B.I. reports must be produced for their inspection. We think the Department of Justice satisfies its duties under § 6(j) when it accords a fair opportunity to the registrant to speak his piece before an impartial hearing officer; when it

> permits him to produce all relevant evidence in his own behalf and at the same time supplies him with a fair résumé of any adverse evidence in the investigator's report.
>
> * * * * *
>
> Accordingly, the standards of procedure to which the Department must adhere are simply standards which will enable it to discharge its duty to forward sound advice, as expeditiously as possible, to the appeal board. Certainly, this is an important and delicate responsibility, but we do not think the statute requires the Department to entertain an all-out collateral attack at the hearing on the testimony obtained in its prehearing investigation.

Without attempting to reargue the points that were there fully briefed[26] and decided by this Court, we emphasize that the entire F.B.I. investigation has a limited and narrow place in the special statutory procedure with respect to conscientious objector cases. The investigation is neither intended nor fitted for absolving petitioner of his own obligation to present facts qualifying him for the special exceptional exemption he claims, since he himself is the person most familiar with the persons and activities that can most favorably attest his sincerity and true conviction. The F.B.I. inquiry is merely one aid to the ultimate determination of the subjective question of sincerity on which the Department must make a recommendation and the appeal board a decision. And if neighbors, friends and the like are to take the chance of publicity and reprisals by their answers to investigators, the investigation is not likely to be of any aid at all.

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[26] See the government's briefs in Nos. 540 and 573, October Term, 1952.

Nothing which has occurred since 1953 has weakened the force of the *Nugent* decision. Indeed, the fact that Congress, in its several subsequent amendments to the Act (see *supra,* p. 50), has indicated no intent contrary to the Court's conclusions suggests that it accepted the decision as a correct interpretation of its enactment. Nor does anything in this Court's decision in *Jencks* v. *United States,* 353 U.S. 657, affect the basis of *Nugent.* The *Jencks* decision dealt with the pretrial statements made by persons called as adverse witnesses by the prosecution in a criminal trial. 353 U.S. at 667. Since then the Congress has made even clearer by statute, 18 U.S.C. 3500, that a demand for production of F.B.I. reports must be based on the testimony of a witness at the trial. See, generally, *Palermo* v. *United States,* 360 U.S. 343; *Rosenberg* v. *United States,* 360 U.S. 367. On the other hand, at a Justice Department conscientious objector hearing, no witnesses are generally called by the government—and, in fact none were called at petitioner's hearing. Instead, it is the registrant who, after being given a résumé of anything unfavorable in the reports, is given the opportunity to call witnesses to give testimony in his favor.

B. AT TRIAL

Petitioner argues that, even if he was not entitled to the F.B.I. reports before the Department of Justice hearing, he was entitled to them at the trial so that he could attack the fairness of the résumé given him. It follows almost inexorably, however, from *United States* v. *Nugent, supra,* that F.B.I. reports need not be produced at the trial. In fact, although the registrants in *Nugent* also raised the issue of production at trial,[27] this contention was apparently not even considered worthy of separate discussion by the Court in affirming the convictions. Certainly, it would seem strange to hold that a registrant is entitled to no more than a résumé of the F.B.I. reports before the hearing, only to require production and disclosure after the résumé procedure has been properly followed. It would be particularly strange, since the appeal board—which we stress is the adjudicating body—does not receive the F.B.I. reports, but rather receives the same résumé as does the registrant. And as the Court of Appeals for the Ninth Circuit observed with respect to *Nugent* in *White* v. *United States,* 215 F. 2d 782, 791, certiorari denied, 348 U.S. 970:

> We refuse to believe that the [Supreme] Court labored and brought forth a mouse of a decision that the hearing officer need not show the FBI report when the situation was such that the trial court must necessarily admit it.

Similarly, the late Chief Judge Parker stated for the Fourth Circuit in *Campbell* v. *United States,* 221 F. 2d 454, 459:

> It would be absurd, we think to hold that a registrant is not entitled to have the benefit of the F.B.I. report at hearings where questions of fact are being determined and the report might be of

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[27] Resp. Br. 17, 181, R. 13, No. 540, October Term, 1952.

> use to him but that he is entitled to have it after the determinations of fact have been made and the only question is the validity of the action of the fact-determining body.

Thus, as petitioner suggests (Pet. Br. 41–43), his contention on this score has been rejected by the courts of appeals. *Tomlinson* v. *United States*, 216 F. 2d 12, 16–17 (C.A. 9), certiorari denied, 348 U.S. 970; *Rogers* v. *United States*, 263 F. 2d 283, 286–287 (C.A. 9), certiorari denied, 359 U.S. 967; *Leifer* v. *United States*, 260 F. 2d 648 (C.A. 6), certiorari denied, 358 U.S. 946; *Carnes* v. *United States*, 260 F. 2d 341 (C.A. 6), certiorari denied, *sub nom. Leifer* v. *United States*, 358 U.S. 946; *McFarland* v. *United States*, 260 F. 2d 566 (C.A. 6), certiorari denied *sub nom. Leifer* v. *United States*, 358 U.S. 946; *Bouziden* v. *United States*, 251 F. 2d 728, 730–732 (C.A. 10), certiorari denied, 356 U.S. 927; *Blalock* v. *United States*, 247 F. 2d 615, 619–621 (C.A. 4); *United States* v. *Neverline*, 266 F. 2d 180, 183 (C.A. 3); *United States* v. *Dal Santo*, 205 F. 2d 429, 431–432 (C.A. 7), certiorari denied, 346 U.S. 858; *United States* v. *Simmons*, 213 F. 2d 901, 909–910 (C.A. 7), reversed on other grounds, 348 U.S. 397.

Admittedly, in some circumstances, there could be a real question as to the fairness of the résumé given the registrant as shown by facts developed at the Department hearing or by reference in the Department's recommendation to unfavorable facts said to come from the F.B.I. reports which were not included in the résumé. Whether the full reports must be produced in such circumstances should be left for decision in a case where such facts are presented. But here the unfavorable facts mentioned in the résumé as to police detention were told to petitioner and were not relied upon in any sense. The only other unfavorable fact in the résumé—petitioner's cessation of one hundred hours per month of preaching—is not disputed. Beyond that, the résumé reported only favorable material.

Moreover, the résumé and the F.B.I. reports underlying it are irrelevant to the questions at issue in petitioner's trial, *i.e.,* whether the contemporaneous record of petitioner's appearance before the local board was correct and whether his conduct at that time furnished a basis for denial of his claim to conscientious objection. The Department of Justice recommended against petitioner's exemption because of the disparity between his representations to the local board and the admitted facts. This reflection upon petitioner's honesty was based, not upon the F.B.I. reports, but upon petitioner's own selective service file, to which he knew that he had full access. Indeed, it was not even necessary for petitioner to refer to the selective service file, for he had been served with a résumé referring to the statements of his own religious sect as to his reduced hours of public preaching and loss of Pioneer status, and he himself knew, and admits, that despite this change he nevertheless claimed exemption as a minister. Thus, the denial of petitioner's claim to exemption rests upon evidence and admissions totally outside the F.B.I. reports. Those reports were neither necessary nor relevant at his trial.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 416

RAYMOND GONZALES, JR.,
Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 416

RAYMOND GONZALES, JR.,
Petitioner

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MAY IT PLEASE THE COURT:

Now comes the petitioner in this case and files this his reply brief. The reply will be directed only at the "Statement" and the "Summary of Argument" appearing at pages 9-30 of the brief for the Government.

I.

The Government (page 10 of its brief) emphasizes the full-time ministry of petitioner and that he stated he was devoting "a minimum of 100 hours a month" to preaching in a letter dated October 31, 1952, at which time he was a Stock Servant at the Longmont, Colorado, congregation of Jehovah's Witnesses. It should be remembered that the petitioner was then a full-time Pioneer minister and that he later abandoned that ministry after his first classification and before his last classification. Under the Regulations and the decisions the only material facts involved are those that existed at the time of the final classification.—*United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633 (7th Cir. 1945).

II.

On page 11 of the Government's brief it is emphasized that petitioner discontinued the full-time Pioneer ministry and then no longer devoted 100 hours per month to public preaching on April 1, 1953, but that he did not "notify the local board of this change." It was not necessary for petitioner to notify the board of such change since he had been classified not as a minister but as a conscientious objector on December 4, 1952, and after April 1, 1953, he was not entitled to be classified as a minister under the law, having discontinued full-time Pioneer ministry as his vocation.

III.

On page 12 of the Government's brief it is emphasized that the resume accompanying the first recommendation of the Department of Justice dated April 5, 1954, refers to the fact that petitioner had discontinued his full-time ministry and relinquished his position as Bible Study Servant. These papers were in the file on April 5, 1954, which was before his case was considered by the local board. This was actual notice to the local board of a discontinuance of the full-time ministry and it was unnecessary for petitioner to supplement this notice, even though he was unaware of the resume appearing in his file.

In this same connection it should be noted that in May of 1956, when petitioner answered the marital status form, he showed that he was "self employed at masonry work in Colorado Springs", thus notifying the local board that he was not engaged in the full-time ministry. He did thereby impliedly notify the local board that he no longer was a Pioneer, contrary to the statement appearing on page 12 of the Government's brief, that he did not notify the board "of the loss of his Pioneer status." Such failure is insignificant since petitioner had impliedly notified the board of his vocation being "masonry work" and not the ministry. Draft board proceedings are not adversary proceedings and petitioner was not to be dealt with as though he were represented by a lawyer.—*United States ex rel. Berman* v. *Craig*, 207 F. 2d 888, 891 (3rd. Cir. 1953); *United States* v. *Greene*, 220 F. 2d 792, 794 (7th Cir. 1955).

IV.

On page 13 of its brief the Government in footnote 6 suggests—by way of speculation—that petitioner read his letter of November 22, 1952, to the board when he appeared for the hearing on August 17, 1956. There is no basis for this long guess. The only testimony in the entire case is that petitioner was denied the right to present any evidence about his ministry. The Government failed to call any member of the local board or the clerk of the local board to dispute the oral testimony of the petitioner. Since the question involved here is: whether there is a denial of procedural due process and it is not a matter of classification it is not the papers in the Selective Service file that determines the question but it is only the oral testimony that is offered at the trial. (*United States* v. *Zieber,* 161 F. 2d 90, 92 (3rd Cir. 1947)) Since the Government did not elect to challenge the testimony of the petitioner by calling the clerk or members of the local board, the testimony of the petitioner should be accepted as true or at least as raising reasonable doubt as a matter of law so as to require a remand of this case for another trial in order to enable the Government to call such officials.

V.

The Government at the top of page 17 of its brief states that petitioner failed to specify favorable evidence appearing in the original FBI reports not forwarded to the appeal board. How could petitioner specify the contents of the documents withheld both in the administrative proceedings and in the trial court?

VI.

In the summary of argument at the bottom of page 18 of the Government's brief it is said that the "basis of this recommendation" was the memorandum of the local board of August 17, 1956. While the recommendation was a basis, it was not the sole basis for the appeal board's classification. The appeal board did not make a memorandum of its reasons for decision.

which throws the Court upon a sea of doubt and speculation.—*United States* v. *Hagaman*, 213 F. 2d 86 (3rd Cir. 1954); *Ypparila* v. *United States*, 219 F. 2d 465 (10th Cir. 1954).

VII.

The Government at the bottom of page 18 and the top of page 19 emphasizes that the hours devoted to the ministry were exaggerated upon the personal appearance, August 17, 1956, without notice of change from petitioner. Petitioner had previously notified the local board by letter of his being engaged in full-time secular work, which impliedly indicated that he was no longer a full-time minister. It was unnecessary for petitioner to notify the board of the change because the board had received notice from the FBI of such change appearing in the resume of inquiry.

VIII.

The Government argues on page 19 that the memorandum of the local board is "conceded . . . to be correct in important respects." The memorandum has never at any time been conceded to be correct in important respects. The memorandum is correct only insofar as it indicates the appearance of petitioner and his desire to present evidence but it fails to show that he was denied the right to present evidence and in lieu thereof it contains an obvious false repetition of a letter written to the local board by petitioner several years earlier than the 1956 hearing. There is every "reason to doubt the remaining part," set forth in footnote 5, page 7 of petitioner's brief. The argument of the Government, that petitioner "either read the earlier letter or a copy, or the letter was read to petitioner and reaffirmed by him," is mere speculation. There is no testimony to this effect. There is no memorandum in the draft board file to indicate it. It is wholly improper for the Government to so argue that it is a fact, especially since the Government failed to call any member of the local board or the clerk of the board to give testimony or explain the reason for adding the quotation of the 1952 letter of petitioner to the local board to its memorandum of personal appearance in 1956.

IX.

The Government argues that the local board was required "by regulation" to summarize the personal appearance (page 19). This is incorrect. Years ago the Regulations did so require. But since a number of acquittals were granted because of the failure of the local boards to make a memorandum the requirement was completely eliminated. *United States* v. *Zieber*, 161 F. 2d 90 (3rd Cir. 1947); *United States* v. *Stiles*, 169 F. 2d 455 (3rd Cir. 1948).

X.

While counsel for petitioner admits his right to examine the file, as stated by the Government at the top of page 20 of its brief, the undisputed evidence shows that petitioner did not know of his right and that the memorandum was not only made and filed behind his back but it was also sent to the appeal board behind his back after the Department of Justice had based its recommendation upon the false memorandum. Petitioner could not answer because he had no notice until it was too late.

XI.

The Government emphasizes that during a three-year period between petitioner's quitting the full-time ministry and his personal appearance he did not give notice of the change. This information, however, was given to the board by the FBI and such fact would not have affected petitioner's classification since he was never classified as a minister. Since the change did not affect his conscientious objector classification it was not necessary for him to notify the local board about the change, especially since the FBI in the first resume had notified the board.

XII.

It is argued in the middle of page 20 of the Government's brief that since petitioner "expressly claimed ministerial classification during his appearance before the local board" this is to be taken against him. There is no basis for this contention. The FBI had previously informed the board of the discontinuance of the full-time ministry by petitioner and it was unnecessary for petitioner to submit anything except "the fact of his marriage" especially since in an earlier letter to the board he had indicated that he was engaged in full-time secular work.

XIII.

It is argued at the bottom of page 21 that the Department "could justifiably rely" upon the false local board memorandum since petitioner did not challenge it "as to its accuracy." Petitioner had no chance to challenge it until after the Department of Justice had completed its proceedings. The appeal board sent him a copy of the final recommendation of the Department of Justice and he attempted to answer it. But this was too late. The position of the Department of Justice had passed the stage of "jelling" to the point of becoming as hard as ice against him. The right to answer the recommendation after the appeal board had considered it was too late and too little.—*Gonzales* v. *United States*, 348 U. S. 407 (1955).

XIV.

It is argued that the procedure of the Department of Justice allows due process (page 22 of the Government's brief). This right to receive a resume of the FBI reports did not benefit petitioner in this case because it failed to indicate anything about petitioner claiming to devote 100 hours to the ministry per month. The resume showed the contrary, that petitioner was engaged in the part-time ministry.

XV.

It is argued at the bottom of page 22 of the Government's brief that petitioner had the right to answer the recommendation of the Department of Justice when it was sent to him by the appeal board after the Department had adversely recommended against him. It is said that he "may file a reply with the board," which is "too little and too late."—*Gonzales* v. *United States*, 348 U. S. 407 (1955).

XVI.

At the top of page 23 of the Government's brief it is stated that the Government could rely "upon the unchallenged official record of petitioner's personal appearance" in August of 1956. The memorandum was challenged as soon as it was know to petitioner, which was not until after the indictment and shortly before trial in the District Court. The right of petitioner to answer the position of the Department of Justice on alleged exaggeration of hours came "too little and too late."—*Gonzales* v. *United States*, 348 U. S. 407 (1955).

XVII.

It is argued at the top of page 24 of the Government's brief that the hearing officer's report was immaterial because it involved going into the processes and reasoning of the hearing officer. This is a specious argument. The reason the official report of the hearing officer was needed was not for the purpose of going into the reasoning of the hearing officer but for the purpose of showing that he denied procedural due process by denying a full and fair hearing, by making an illegal recommendation and by not submitting all of the favorable evidence given by the petitioner. The fact that the recommendation of the Department of

Justice is advisory is immaterial since it was relied upon and thus was made a link in the chain of proceedings.—*Sicurella* v. *United States*, 348 U. S. 385 (1955).

XVIII.

It is submitted that the argument at the top of page 25 of the Government's brief about Congress reenacting the Universal Military Training and Service Act during the years 1955, 1957 and 1958 constituting congressional approval of the new Regulations is immaterial. The mere extension of an act without amendment or specific reenactment does not constitute approval of the new Regulations so as to repeal the old Regulations approved by Congress in 1948 and 1951.

XIX.

It is argued at the middle of page 26 that, since the hearing officer's report "was not submitted to the appeal board," it cannot harm the petitioner. The Regulations, as approved in 1948 and 1951, required the inclusion of the hearing officer's report and it is immaterial whether the report constituted "adverse testimony" as argued by the Government. The fact that petitioner was informed of the report by summary appearing in the final recommendation is immaterial.

XX.

It is argued at the bottom of page 27 that the hearing officer's report was immaterial since it had "no bearing" on the correctness of the local board memorandum. The hearing officer's report was needed to show that there was a denial of due process of law at the hearing and that the hearing officer withheld favorable evidence from the appeal board.

XXI.

It was unnecessary for petitioner to make a claim "during the administrative process" as stated at the top of page 28 of the Government's brief, since petitioner is not to be dealt with as though the draft proceedings were adversary proceedings in which he was represented by counsel.—*United States ex rel. Berman* v. *Craig*, 207 F. 2d 888, 891 (3rd Cir. 1953); *United States* v. *Greene*, 220 F. 2d 792, 794 (7th Cir. 1955).

XXII.

The production of the report at the trial was not immaterial, as stated at the top of page 28, because the appeal board consideration was limited to the recommendation of the Department of Justice. The recommendation referred to the hearing officer's report. The report of the hearing officer was needed to show that there was a denial of procedural due process at the hearing and this does not appear in the resume although referred to in the final recommendation. The report was material since it was the main and best source of information as to whether there was a denial of procedural due process at the hearing.

XXIII.

At the bottom of page 28 of the Government's brief it is argued that, since petitioner did not object to the resume at the hearing and does no now "specify any inaccuracy or unfairness," the FBI reports cannot be compulsorily produced. The plain answer to this is that it was impossible for petitioner and is now impossible for his counsel to specify any inaccuracy. Neither has ever had an opportunity to make a comparison between the original FBI reports and the resume in order to establish such fact.

XXIV.

It is argued at the top of page 29 that, since the final recommendation of the Department of Justice was based upon the local board memorandum and not upon anything in the FBI reports, the FBI reports are immaterial. The plain answer to this is that petitioner desired to show in the District Court that he had been denied procedural due process of law by the withholding of favorable evidence from the appeal board. The fact that the final recommendation of the Department of Justice was based upon some illegal ground, the misconception of the facts based upon the false memorandum of the local board, does not eliminate the fact that there could be a violation of procedural due process of law in another respect, namely, the withholding of favorable evidence from the appeal board that may have resulted in a conscientious objector classification. It is suggested that the appeal board classification was based on the recommendation and nothing else. No one can prove this assertion of the Government since the appeal board failed to write a memorandum showing reasons for the denial of the conscientious objector classification.—*United States* v. *Hagaman*, 213 F. 2d 86 (3rd Cir. 1954); *Ypparila* v. *United States*, 219 F. 2d 465 (10th Cir. 1954).

XXV.

It is suggested that Congress has amended the Act several times since *United States* v. *Nugent*, 346 U. S. 1 (1953), and thereby approved that decision. The several extensions of the Universal Military Training and Service Act, passed in 1951, do not constitute congressional approval of *United States* v. *Nugent*, 346 U. S. 1 (1953), decided after the enactment of the law.

XXVI.

It is interesting to note that the Government in this case has wholly failed to answer the argument of the petitioner that Congress intended that there be not only a summary or resume of the unfavorable evidence but also of the favorable evidence appearing in the original FBI report, which is the issue in this case. Certain it is that Congress intended that there be no one-sided presentation of the evidence turned up by the FBI in its inquiry under Section 6(j) of the Act. Due process of law and the "fair and just" provisions of Section 1 of the Act demand that the favorable, as well as the unfavorable, evidence be produced and it is extraordinary that the Government has failed to answer this argument. Does this mean that petitioner's argument on this point is unanswerable?

Conclusion

WHEREFORE, for the reasons stated above and for those appearing in petitioner's main brief, the judgment of the court below should be reversed and the prosecution ordered dismissed or, in the alternative, a new trial should be directed.

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Brooklyn 1, New York
Counsel for Petitioner

April, 1960.

SUPREME COURT OF THE UNITED STATES

No. 416.—October Term, 1959.

Raymond Gonzales, Jr., Petitioner, *v.* United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 27, 1960.]

Mr. Justice Clark delivered the opinion of the Court.

This is a prosecution for refusal to be inducted into the armed services, in violation of the provisions of the Universal Military Training and Service Act, 62 Stat. 622, 50 U. S. C. App. § 462 (a). Petitioner, who claims to be a conscientious objector, contends that he was denied due process, both in the proceedings before a hearing officer of the Department of Justice and at trial. He says that he was not permitted to rebut before the hearing officer statements attributed to him by the local board, and, further, that he was denied at trial the right to have the Department of Justice hearing officer's report and the original report of the Federal Bureau of Investigation as to his claim—all in violation of the Fifth Amendment. The trial judge decided that the administrative procedures of the Act were fully complied with and refused to require the production of such documents. The jury found petitioner guilty and he was sentenced to 15 months' imprisonment. The Court of Appeals affirmed. 269 F. 2d 613. We granted certiorari in view of the importance of the questions in the administration of the Act. 361 U. S. 899. We have concluded that petitioner's claims are controlled by the rationale of *Gonzales* v. *United States*, 348 U. S. 407 (1955), and *United States* v. *Nugent*, 346 U. S. 1 (1953), and therefore affirm the judgment.

Petitioner registered with Local Board No. 9, Boulder, Colorado, on March 17, 1952. His answers to the classification questionnaire reflected that he was a minister of the Jehovah's Witnesses, employed at night by a sugar producer. He claimed IV-D classification as a minister of religion, devoting a minimum of 100 hours a month to preaching. On November 13, 1952, he was classified in Class I-A. On November 22, 1952, he wrote the Board protesting this classification. He again stated that he was "a regular minister"; that he was "devoting an average of 100 hours a month to actual preaching publicly," in addition to 50 to 75 hours in other ministerial duties, and that he opposed war in any form. Thereafter he was classified I-O. On April 1, 1953, after some six months of full-time "pioneering," petitioner discontinued devoting 100 hours a month to preaching, but failed to so notify his local board. In a periodic review, the local board on July 30, 1953, reclassified him I-A and upheld this classification after a personal appearance by petitioner, because of his willingness to kill in defense of his church and home. Upon administrative approval of the reclassification, he was ordered to report for induction on June 11, 1956, but failed to do so. He was not prosecuted, however, and his case was subsequently reopened, in the light of *Sicurella* v. *United States*, 348 U. S. 385 (1955). He was again reclassified I-A by the local board. There followed a customary Department of Justice hearing at which petitioner appeared. In his report to the Attorney General, the hearing officer suggested that the petitioner be exempt only from combatant training and service. On March 21, 1957, however, the Department recommended approval of the I-A classification. Its ground for this recommendation was that, while petitioner claimed before the local board on August 17, 1956 (as evidenced by its memorandum in his file of that date), that he was devoting 100 hours per month to actual preaching, the headquarters of the Jehovah's Witnesses reported that he was no longer doing so and, on the contrary, had relinquished both his Pioneer and Bible Student Servant positions. It reported that he now devoted only some 6½ hours per month to public preaching and from 20 to 25 hours per month to church activities. His claim was therefore "so highly exaggerated," the Department concluded, that it "cast doubt upon his veracity and, consequently, upon his sincerity and good faith." The appeal board furnished petitioner a copy of the recommendation. In his answer thereto, he advised the Board that he had made no such statement in 1956, and asserted that his only claim to "pioneering" was in 1952. The appeal board, however, unanimously concurred in the Department's recommendation. Upon return of the file to the local board, petitioner was again ordered to report for induction and this prosecution followed his failure to do so.

Petitioner first contends that the Department denied him procedural due process by not giving him timely opportunity, before its final recommendation to the appeal board, to answer the statement of the local board as to his claim of devoting 100 hours to actual preaching. But the statement of the local board attributing this claim to petitioner was in his file. He admitted that he knew it was open to him at all times, and he could have rebutted it before the hearing officer. This he failed to do, asserting that he did not know it to be in his file. Apparently he never took the trouble to find out. Nevertheless he had ample opportunity to contest the statement before the appeal board. After the recommendation of the Department is forwarded to the appeal board, that is the appropriate place for a registrant to lodge his denial. This he did. We found in *Gonzales* v. *United States*, *supra*, that this was the controlling reason why copies of the recommendation should be furnished a registrant. We said there that it was necessary "that a registrant be given an opportunity to rebut [the Department's] recommendation when it comes to the Appeal Board, the agency with the ultimate responsibility for classification." 348 U. S., at 412. We fail to see how such procedure resulted in any prejudice to petitioner's contention, which was considered by the appeal board and denied by it. As was said in *Gonzales*, "it is the Appeal Board which renders the selective service determination considered 'final' in the courts, not to be overturned unless there is no basis in fact. *Estep* v. *United States*, 327 U. S. 114." 348 U. S., at 412–413.

But there are other contentions which might be considered more difficult. At his trial, petitioner sought to secure through subpoena *duces tecum* the longhand notes of the Department's hearing officer, Evensen, as well as his report thereon. Petitioner also claimed at trial the right to inspect the original Federal Bureau of Investigation reports to the Department of Justice. He alleged no specific procedural errors or evidence withheld; nor did he elaborate just what favorable evidence the Federal Bureau of Investigation reports might disclose.

Section 6 (j) of the Act, as we have held, does require the Department's recommendation to be placed in a registrant's file. *Gonzales* v. *United States, supra.* But there is nothing in the Act requiring the hearing officer's report to be likewise turned over to the registrant. While the regulations formerly required that the hearing officer's report be placed in the registrant's file, this requirement was eliminated in 1952. Moreover, the hearing officer's report is but intradepartmental, is directed to the Attorney General and, of course, is not the recommendation of the Department. It is not essentially different from a memorandum of an attorney in the Department of Justice, of which the Attorney General receives many, and which he may give his approval or rejection. It is but part of the whole process within the

Department that goes into the making of the final recommendation to the appeal board.

It is also significant that neither this report nor the hearing officer's notes were furnished to the appeal board. Hence the petitioner had full opportunity to traverse the only conclusions of the Department on file with the Board. Petitioner knew that the Department's recommendation was based not on the hearing officer's report but on the statement of the local board in his file. Having had every opportunity to rebut the finding of the local board before both the hearing officer and the appeal board, petitioner cannot now claim that he was denied due process because he did not succeed.[1]

It appears to us that the same reasoning applies to the production of the hearing officer's report and notes at the trial. In addition, petitioner has failed to show any particular need for the report and notes. While there are now allegations of the withholding of "favorable evidence developed at the hearing" and a denial of a "full and fair hearing," no such claim was made by petitioner at any stages of the administrative process. Moreover, his testimony at trial never developed any such facts. In the light of these circumstances, as well as the fact that the issue at trial in this respect centered entirely on the Department's recommendation, which petitioner repudiated but which both the appeal board and the courts below found supported by the record, we find no relevancy in the hearing officer's report and notes.

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[1] Petitioner points out that the regulations, as we have said, at one time required copies of the hearing officer's report to be placed in the registrant's file. He attributes congressional approval thereto because the selective service laws were re-enacted and amended in 1951 and 1952. The same reasoning would apply, however, to the repeal of the regulation. As we noted, it was stricken by the Attorney General in 1952 and Congress has amended the Act three times subsequently—in 1955, 1957, and 1958. Still it has failed to indicate any objection to the repeal of the regulation.

Finally petitioner says that he was entitled to inspect the FBI report during the proceedings before the hearing officer as well as at the trial. He did receive a résumé of it—the same that was furnished the appeal board—and he made no claim of its inaccuracy. Even now no such claim is asserted. He bases his present contention on the general right to explore, indicating that he hopes to find some discrepancy in the résumé. But this is fully answered by *United States* v. *Nugent*, *supra*. There we held "that the statutory scheme for review, within the selective service system, . . . entitles [conscientious objectors] to no guarantee that the FBI reports must be produced for their inspection." 346 U. S., at 5–6. Even if we were not bound by *Nugent*, petitioner here would not be entitled to the report. The recommendation of the Department—as well as the decision of the appeal board—was based entirely on the local board file, not on an FBI report.

As to the production of the report at the trial, it is true that, while that issue was raised in *Nugent*,[2] the Court gave it no separate treatment. However, it would be an act of folly not to require their production before the appeal boards whose "actions are final" and to be overturned "only if there is no basis in fact for the classification," *Estep* v. *United States*, 327 U. S. 114, 122 (1946), and subsequently to require their production at the trials in the District Courts. We note that the Courts of Appeals have uniformly rejected such claims. This is not to say that there might not be circumstances in a particular case where fairness in the proceeding would require production. No such circumstances, as foundation for a claim of actual unfairness, are before us. Contrariwise, the résumé fully set out petitioner's statement before the local board as to his ministerial activity. Since this is not disputed, and since the Department's recommendation was based on a disparity between petitioner's representations before the local board—not on the FBI report—it follows that the reasoning of *Nugent* controls.

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[2] Joint Brief for Respondents, p. 181, *United States* v. *Nugent*, 346 U. S. 1 (1953).

Petitioner raises other points, such as the fact that the prosecutor did not call the members and clerk of the local board to testify at his trial. We find no substance in any of them. Petitioner could have subpoenaed any witnesses he wished at the trial. It was he who was challenging the classification. The Government relied only on the record in the file, all of which was available to petitioner. He makes much of the identity of the language of the statement he is found to have made before the local board on August 17, 1956, as to his ministerial activity, and his earlier letter to the Board in 1952. But all of this was before the appeal board. Moreover, he could have called witnesses to bring out the circumstances surrounding the statement and the letter; the FBI files would have been to no avail. He contented himself, however, with offering only his own denial. The appeal board resolved this issue against him. It found that his claim as to ministerial activity was exaggerated and cast doubt on his sincerity. Both courts below have found "that the record is not without evidence to support these conclusions." We will not set aside their findings here.

Affirmed.

V

SUPREME COURT OF THE UNITED STATES

No. 416.—October Term, 1959.

Raymond Gonzales, Jr., Petitioner,
v.
United States of America.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 27, 1960.]

Mr. Chief Justice Warren, with whom Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Brennan join, dissenting.

I cannot agree with the decision of the Court, for I believe that petitioner has been deprived of a right which is his by statute and regulation—the right to a full hearing. The facts of this case not only indicate a miscarriage of justice, but also underline the significance of the hearing rights which petitioner was never accorded.

Petitioner, a youth of 18 at the time, first claimed exemption as a minister of Jehovah's Witnesses in 1952, describing the extent and nature of his religious activities in a detailed letter to the local selective service board. The board, however, classified him 1-A, and, after an unsuccessful appeal, he was ordered to report for induction. Although he refused to comply with the order, his case was reopened after our decision in *Sicurella* v. *United States*, 348 U. S. 385.[1] He renewed his claim for exemption, asserting that he was a minister and a conscientious objector, but again the local board ruled adversely. On appeal, the case was referred to the Department of Justice, and petitioner appeared before a hearing officer.

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[1] In *Sicurella*, which involved a member of Jehovah's Witnesses, we held that the petitioner's willingness to fight in defense of his "ministry, Kingdom Interests and . . . his fellow brethren" was not, under the circumstances, a sufficient basis upon which to deny him exemption as a conscientious objector.

The hearing officer's report, as summarized by the Department of Justice, was as follows:

> "The Hearing Officer reported that registrant gave the appearance of being sincere and firm in his beliefs and that he appeared to be well versed in the scriptures. He found that registrant's objections are based upon his religious training and beliefs but concluded that he is not opposed to participation in war in any form. He further concluded that registrant was opposed to combatant training and service but not opposed to noncombatant training and service. He, therefore, recommended that registrant be exempt from combatant training and service only."

This was hardly an astonishing recommendation, inasmuch as the summaries of two F. B. I. investigative reports were entirely—and in my judgment conclusively—favorable. At the time of the first report in 1954, petitioner's grade-school teachers related that he had been "very cooperative [and] mannerly," and that he had "refused to salute the flag on religious grounds." His former employers "found him an excellent worker, very serious about his religion and sincere and fair in his dealings." His neighbors stated that he was "a quiet and orderly young man whose character and reputation are good," that he was a "very active" member of the Jehovah's Witnesses, and that they considered him to be "sincere in his beliefs." Petitioner's references and his fellow members in the sect said that he was "a very active, sincere member," and that they believed he was "in good faith in his conscientious-objector claim." The second report, dated 1956, incorporated the first and added the following: Petitioner's employer regarded him as "an excellent worker, completely reliable, dependable and of excellent morals, character and associates." His acquaintances, neighbors and religious associates "all spoke favorably concerning [his] character and reputation, conduct and morals," and reported that he was "very active in . . . church affairs . . . and . . . very devoted to his religious beliefs." They stated that he "lives up to the teachings of the church and is considered to be sincere in his religious beliefs and in his conscientious-objector claim. The hearing officer was understandably impressed.

However, the Chief of the Conscientious-Objector Section of the Justice Department, who reviewed the file, took a contrary view. He fastened upon a single item in the file—a matter which had neither been mentioned by the hearing officer nor for all that appears, relied upon by the local board—and recommended to petitioner's appeal board that the claim not be sustained. The item in question was the local board's summary of petitioner's appearance before it in 1956, which the section chief interpreted to state that petitioner at that time had claimed he was still devoting 100 hours a month to preaching, as his 1952 letter to the board had stated.[2] Since the investigative reports indicated that petitioner's status as a Jehovah's Witness "Pioneer" had terminated in 1953, and that from 1954 to 1956 he had devoted only six and one-half hours a month to preaching, the section chief concluded that petitioner's "claim as to the amount of his religious activities is so highly exaggerated . . . as to cast doubt upon his veracity and, consequently, upon his sincerity and good faith."

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[2] The local board memorandum reads in full as follows:

"When asked by the members of Local Board No. 9, Boulder, Colorado, if he thought he was entitled to any other classification than that of 1-A, Mr. Gonzales replied, 'I am a minister and as such should be classified 4-D. Also, a minister is automatically classified as a conscientious objector.' The board replied that this statement was in error.

"Mr. Gonzales then went on to say that he had always made the claim that he was a minister even at the very beginning of his registration. He still made the statement that if I am a minister I am a conscientious objector.

"When asked if he would participate in the conscientious objector work program, he stated definitely not.

"Mr. Gonzales stated '*I am a regular minister as defined under section 16 G part II of the laws and regulations set out by Selective Service Act of 1948. At present I am devoting an average of 100*

Petitioner was informed of this recommendation, and wrote to the appeal board as follows:

> ". . . I would like to state that I *did not* at such a time [in 1956] make such a statement or any statement implicating the same. The only time I submitted such information was when I was pioneering

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hours a month to actual preaching publicly and from house to house, and an additional 50–75 hours in preparation for ministerial duties such as; preparation for home bible studies; calling back on good-will persons; attending congregational meetings; as well as training students to become ministers. I also serve as Stock Servant for the local congregation. As you perhaps already know that the Selective Service National Headquarters has determined that Jehovah's Witnesses and the Watchtower Bible and Tract Society constitutes a recognized religious organization and that all Jehovah's Witnesses who are regularly and customarily teaching and preaching the doctrines and principles of the Bible as advocated by Jehovah's Witnesses as a vocation and not incidentally are entitled to exemption as ministers of religion. These are some of the reasons I request a 4-D classification, so I would like for you to further consider my case as a minister of the gospel or would like to appear in person before the local board members for further consideration or discussion in regard to my case.'

"When asked by the board if he had any further information to submit, he stated he submitted no new evidence except what was stated above, but would like to submit a certificate of marriage as the only new matter to be brought before the board."

The italicized portion repeats the statement petitioner made in his 1952 letter to the local board. The significance of this repetition is discussed *infra*.

that was in the period of October 1, 1952 to April 16, 1953. . . . I would like to make it plain that I in no manner ever exaggerated my report concerning my activities. The reason being more than just my respect for mere man, but as a Christian and Bible Student I realize I stand before the Higher Authorities Jehovah God and Jesus Christ, I am also fully aware of the consequences to liars as stated at Proverbs 6:16, 17, 19 showing God hates a lying tongue. I also realize that for one to lie would make void his Christian conduct and worship. So please consider the information here submitted, I am sure the record stands behind it all."

This statement, set against the background of the information of record regarding petitioner's character, has the ring of truth. Moreover, it is corroborated by the inherent improbability that petitioner's oral statement in 1956 would have been a word for word and sentence for sentence carbon copy of the written statement he had submitted four years before, down to the request for a personal appearance which he was at that very minute receiving.[3] And it should be emphasized that the only evidence that petitioner made such a statement was the board memorandum, set forth in note 3, *supra*. The most likely explanation is that the local board merely intended to say that petitioner had repeated his basic claim to exemption, and that the board utilized petitioner's prior letter on the assumption that it described that claim. But, so far as appears, no one in the Department took the trouble to ask the local board precisely what its memorandum meant.

Although the Department's recommendation was based upon this dubious foundation, the appeal board followed that recommendation. Before the date scheduled for petitioner's induction, he informed the local board that his wife was pregnant, but the board told him that the notification came too late. Petitioner refused to be inducted, was prosecuted, and was convicted.

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[3] See the italicized portion of the board's memorandum, note 2, *supra*.

The striking thing about this case—aside from the dishonoring of petitioner's claim—is that he never once received a real opportunity to persuade any Department or selective service officer face-to-face that he had not lied to the local board, for the accusation was never made until petitioner's opportunity for oral response had passed. The hearing officer never adverted to the matter, and the Department's recommendation was made on grounds entirely different from the matters which had been explored at the hearing. It is true, as I have indicated, that petitioner was allowed to file a rebuttal before the appeal board; but that rebuttal was *written*, not oral. See 32 CFR § 1626.25 (e). Since the issue was one of credibility, it can hardly be maintained that this afforded petitioner a fair opportunity to meet an accusation determinative of his case.

Nor can it be said that the Department's recommendation, and the basis therefor, has no significance. On the contrary, the statute makes the Department proceeding an integral and important part of the classification process; for every appeal must be referred to the Department, and, although the appeal board is not bound to follow the Department's recommendation, it is admonished by the statute to "give consideration to" it.[4] The fact appears to be that these recommendations are followed in over 90% of the cases.[5] Moreover, the selective service classification which is given administratively cannot effectively be contested in a criminal proceeding in court, in view of the extremely restricted judicial review of that classification. See *Witmer* v. *United States*, 348 U. S. 375. These factors reveal the critical importance of the Department's recommendation, and, in turn, of the inadequate procedures under which petitioner was permitted to present his claim to the Department.

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[4] 62 Stat. 613, as amended, 50 U. S. C. App. § 456 (j).

[5] See Smith and Bell, "The Conscientious Objector Program—A Search for Sincerity," 19 U. Pitt. L. Rev. 695, 702.

Congress fully recognized the significance of the Department of Justice stage of the proceeding, for it directed that every appeal be referred to the Department "for inquiry and hearing," and commanded the Department, "after appropriate inquiry," to "hold a hearing with respect to the character and good faith of the objections of the person concerned." An adverse recommendation is to be made only when "after such hearing the Department of Justice finds that his objections are not sustained."[8] The regulations are in accord. 32 CFR § 1626.25.

In requiring a hearing, Congress did not mean, in my opinion, that a guessing contest would suffice. It is true enough that, prior to the hearing, petitioner could have searched the files and discovered the local board memorandum; but this opportunity hardly measures up to the traditional concept of a hearing as involving notice of charges. And I think it not amiss, in considering this matter, to note that at the time of his appearance before the local board and the hearing officer, petitioner, a laborer with but an eighth-grade education, was a youth of 22 years of age and was unrepresented by counsel. I doubt that anyone would maintain that there would be a hearing in any true sense of the word if such a person were told by the Department that he could appear and say whatever he wished, but that the Department would not indicate to him what it considered pertinent—indeed, what it considered conclusive unless rebutted. Yet in substance this is exactly what happened here. I cannot believe that this procedure comports with Congress' intent.

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[8] Note 4, *supra*

Nor can I reconcile the Court's decision with precedent. In *Morgan* v. *United States*, 304 U. S. 1, the Court held a government rate order void because the stockyards commission men who were affected by it were not given the "full hearing" required by the pertinent statute. There was no question of these individuals not being allowed to argue their case. In fact, there had been a full and lengthy proceeding for the introduction of evidence, and in addition the parties had been granted an oral argument before the Acting Secretary of Agriculture. But this Court nonetheless found that there had not been a hearing within the meaning of the statute, and phrased its holding in language which is uniquely apropos here:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right might be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command." *Id.*, at 18–19.

I do not believe that the claim of Raymond Gonzales to a full hearing is less worthy of consideration than the rights of the stockyards commission men in *Morgan*.

In sum, I am unwilling to attribute to Congress any intent other than one which would guarantee to persons like petitioner every procedural safeguard which appears reasonably designed to insure a fair determination of their claims. We must remember that we are dealing here with a system of universal military service which touches, directly or indirectly, practically every person and every family in this country. When the people are thus brought into contact with the Government, the importance to the commonweal of insuring their confidence in the justness of the program cannot be overemphasized, for to them it is not merely the fairness of a program which is involved, but the fairness of their Government. The sensitivity of Congress to this need is nowhere better demonstrated than in the statutory provisions concerning the treatment of persons claiming exemption as conscientious objectors. As Congress has recognized, one of the most fundamental aspects of our national ethic is a recognition of the worth of the person, acting according to the dictates of his own conscience. And thus it is that, even in formulating legislation deemed to be of prime importance to the very existence of the nation, Congress refrained from impressing into military service those who by religious conviction find war an affront to God and morality. The desire of Congress that such beliefs be respected is further reflected by its unwillingness to entrust to a local board the final authority to pass upon the claims of conscientious objectors. Instead, Congress provided for an appeal within the selective service system, together with a hearing in the Department of Justice. In determining what Congress intended by these statutory provisions, we must not forget the nature of the program with which we are dealing, nor must we forget that most of the subjects of governmental action in these cases are inexperienced youths, many only 18 years of age, often unrepresented by attorneys. I am unwilling to give to a statute conceived in such a context a construction which results in a young man of unblemished reputation, who claims religious scruples, being sent to prison for 18 months without having received a full and fair consideration of his case. I say this with assurance that Congress did not intend that these humanitarian benefits of the Act be accorded grudgingly.

I dissent.